BRIEF OF PETITIONERS IN SUPPORT OF PETITION

(Index hereto follows Index to Petition, *supra.*)

Because of the fact that the record of the evidence, proceedings, orders, and repetitious findings and conclusions in the trial court is enlarged and burdened (a) with more than 8,000 pages of purely incompetent, irrelevant, and immaterial evidence, largely consisting of depositions, which were not read in evidence, but were ordered to be considered in evidence; and with (b) approximately 1,000 pages of orders, findings and conclusions, partaking of the nature of arguments and briefs, usually ranging in length from 10 to 285 typewritten pages; and (c) a large part of the remainder of said record related to issues solely between collateral kindred of the said Jackson Barnett, with which evidence and proceedings, the petitioners herein are not concerned, being granddaughters and direct descendants of Jackson Barnett; and (d) only approximately 500 of the many thousand pages of said record have any relation to the case of petitioners, or to the merits of this Petition for Certiorari, and with the purpose of saving the Court the time and labor of examining said unduly voluminous record, counsel for petitioners have undertaken in the petition, *supra*, and in this brief, *infra*, to present the material parts of said evidence and proceedings. This accounts for the length of this Petition and Brief.

Filed herewith is an Appendix of two volumes; comprising in Volume I, the Brief, Answer and Reply Brief, and

Petition for Rehearing of Appellants, petitioners herein, and in Volume II the Answer Brief of the Appellees, respondents herein, in the Circuit Court of Appeals. Said volumes are herein cited by pages of each document in acquainting the Court with the material contentions and admissions of the parties, and with the fact that there is no issue of material fact presented in the competent evidence in this action as between petitioners and respondents.

While some fifteen reasons or Points are presented in the petition in compliance with the rule that on review only such Points as are alleged in the Petition may be considered on review, only the principle reasons for the exercise of the Court's legal discretion in issuing the Writ of Certiorari herein to review the opinion and judgment of the Circuit Court of Appeals, will be presented at length.

POINT ONE

An agreement between litigants, such as the one here presented, among respondents, relating to the proceedings and issues in the action in court, *which by its terms permits its use, and, which in fact was so employed herein* (pp. 3 to 9 and 35 -36, *supra*) *in influencing the rendition of a judgment in favor of respondents, is inconsistent with the full, impartial and unobstructed course of justice, and is improper, illegal and against public policy, although such agreement would not necessarily be adjudged illegal and against public policy where same is not employed, as the record shows it was employed in the case at bar, to secure the active support of the administrative and judicial officers*

of the Government in controlling the judgment in behalf of respondents.

17 C. J. S., Contracts, Sec. 223, p. 594.

6 R. C. L., Contracts, Secs. 157, 158, p. 751.

Gray v. *McReynolds*, 21 N. W. (Iowa) 777.

Brown v. *First Natl. Bank*, 37 N. E. (Ind.) 158.

Ridenbaugh v. *Young*, 46 S. W. (Mo.) 959.

Gugloz v. *Gehrkens*, 130 Pac. (Cal.) 8.

Dodson v. *McCarnin*, 160 N. W. (Iowa) 927.

Eggleston v. *Pantages*, 175 Pac. (Wash.) 34.

Atwater v. *Sellers*, 239 N. W. (Neb.) 629.

Lazenby v. *Lazenby*, 65 S. E. (Ga.) 120.

While the styling and referring to said contract and agreement as a "Family Settlement" was clearly a misnomer and pure camouflage, *we are not so much concerned with that phase as we are with the obvious record facts set forth on pages 5 to 9, supra, which reveal that the said judgment, if not entered into for such wrongful purpose, was certainly employed by the Assistant United States Attorney, representing the Government and restricted parties, to bring the influence of the officers of the Departments of Interior and Justice and the trial judge to the support of the respondents against these petitioners in consummating the plan to secure a judgment herein establishing the heirship of the respondents to the estate of the said Jackson Barnett, deceased, and which plan so supported was successful.*

On pages 67 to 79, Appellant's Brief, V. I, Appendix

hereto, the relevant record facts are presented at greater length. *The opinion of the Circuit Court of Appeals contains no reference to the participation of the trial judge in the execution, approval and carrying out of said agreement among respondents, the use of same in influencing the judgment herein, or the effect of such participation and use.* The only phase of this series of actions noted in the opinion of the Circuit Court of Appeals is discussed as follows:

> "* * * *Attorneys of widely recognized ability and professional integrity, representing different groups in the contract (respondents) testified that they participated in the negotiations leading up to the preparation and execution of the agreement; that the enormous labor and expense required to make the investigation and produce the evidence necessary to overcome the proof offered by certain claimants, notably Bertha Barnett, Henry Barnett and Mayetta Kingston, were the major factors which induced the parties to enter into the agreement, and that the suppression or withholding of any evidence was never suggested, discussed, contemplated or practiced. They testified without qualification or condition that no pertinent evidence coming to their attention or knowledge had been concealed, or withheld, or excluded from the record. And the contract expressly provided, among other things, that the persons constituting each group should continue to prosecute their claims; and the approval of the Acting Secretary of the Interior, which was essential to the contract becoming binding upon the parties, was subject to the condition that all available evidence should be fully and fairly presented to the court.* * * *" (122 Fed. (2d) p. 786.)

There was no issue or evidence as to the standing, reputation or integrity of any of the attorneys for respondents,

who felt the necessity of testifying; many attorneys for the respondents and all of the numerous employees of the respondents, who assembled the evidence, did not testify; the record shows that no one really took the claim of Bertha Barnett et al. seriously, in that the fact that the claim was fabricated and the evidence inconsistent was evident, and the statement to the contrary is surprising (pp. 13-15, Appellants' Answer and Reply Brief, V. I, Appendix hereto; pp. 82 et seq., Appellees' Brief, V. II, Appendix hereto); however, if true, why pollute the stream of justice rather than fight the legal battle fairly? Of course, the agreement provided that the various members of the groups should continue to present their claims, however, the admitted purpose of the agreement was to prevent the introduction of evidence inimical to any of the groups, and obviously the condition that all available evidence should be fully and fairly presented was less than an idle gesture, and, if taken seriously, would serve to destroy the purpose of the agreement. Indeed, the fact that an Appellate Court was required to take cognizance of such a situation is regrettable.

POINT TWO

Having interpled on behalf of the United States in this proceeding to determine the heirs of said restricted estate, and so acting for the protection of the possession thereof by the United States, as well as in the interest of such restricted Indian claimants, including petitioners, as might be adjudged to be heirs to the said estate, *it follows that the Assistant United States Attorney was without legal or moral*

right to participate in negotiating, executing, presenting, and securing the consideration and approval of the so-called agreement or family settlement, among and on behalf of the respondents, by the officers and representatives of the Departments of the Interior and Justice, and the trial judge, with the purpose of aiding in obtaining a judicial adjudication that the respondents were heirs to the said estate as against these petitioners, and other restricted parties. That the said United States Attorney in said situation was without right or authority to so aid the respondents and to prepare and present to the said trial judge for approval, findings of fact and conclusions of law in favor of said respondents and against these petitioners, and said trial judge is presumed to have known that fact.

That in personally participating in any manner in the said negotiation and approval of the said agreement and in permitting the said United States Attorney to so appear and represent the respondents as against these petitioners and to present said requested findings of fact and conclusions of law and in approving same, the said trial judge gravely erred, and was thereafter disqualified to act in consummation of the agreement.

It is not believed that the Court will need authority in support of the soundness of the above elementary rule that both said United States Attorney and the trial court should have maintained a strict course of impartiality and fairness as to all interveners. The general rule prescribing and governing the neutral conduct of an interpleader, such as

the United States is in the case at bar, is stated as follows in 33 C. J., "Interpleader," Section 20, page 438:

> "Sec. 20 (b): Favoring or Colluding With Particular Claimant. A party seeking the remedy of interpleader must act in good faith. He must occupy an impartial position as to the issue he seeks to have litigated. A plaintiff in a bill of interpleader must not have lent himself in any way to further the claim of either party to the fund in controversy, or to aid one in obtaining the possession thereof to the exclusion of the other. The holder of a fund or property is not entitled to interpleader where he has himself instigated the claim of one of the parties * * * "

Paragraph 47, p. 459, same, as follows:

> "* * * Where a petition in the nature of an interpleader shows plaintiff a mere stakeholder, with no interest in the subject-matter, a reply which assumes an offensively hostile attitude toward one of the interpleaded defendants, alleging that the latter is estopped from making claim to any right to the stake, is improper, and must at least be disregarded, if not treated as ground for dismissal of the proceeding. 15 R. C. L. 226, as follows:
>
> "'It is of the essence of an interpleader suit that the plaintiff should be entirely indifferent between the conflicting claims, asserting no interest in himself in the fund in dispute. An attitude of perfect disinterestedness, excluding even an indirect interest, on the part of the plaintiff is indispensable to the maintenance of the bill, and his position must be one of "continuous impartiality", save that the thing in his possession be awarded to the right party * * *'."

In numerous cases cited to said above-quoted text, the rule is stated as follows:

> "To invoke the principle of interpleader, the party seeking relief must have incurred no independent liability to either claimant, and must stand perfectly indifferent between them in the position of an innocent stakeholder."

We have found no authority to the contrary.

On pages 79 to 82, Appellants' Brief, V. I, Appendix hereto, the unchallenged facts are fully presented. The Circuit Court of Appeals overlooked this point.

POINT THREE

That the said trial judge was personally biased and prejudiced against petitioners and in favor of respondents is clearly evidenced by the repeated, unprovoked, unquestioned hostile, oppressive, threatening acts and charges on the part of the said trial judge against petitioners, petitioners' counsel and witnesses during said purported hearing, and that the participation of the said trial judge prior to said purported trial in the approval and carrying out of the said agreement among respondents against these petitioners, without doubt, served as the source and basis of said prejudice, and as a result thereof petitioners were precluded from fairly presenting their case, and the mind of the trial judge incapacitated to fairly weigh and consider same, and the proceeding was wholly divested of the principal characteristics of a judicial hearing and fails to reflect that calm and deliberate consideration of the evidence and judicial impartiality which are consonant with the administration of justice and due process of law. (Pp. 82 et seq.,

Appellants' Brief, V. I, Appendix hereto; pp. 512-547, V. I, Clk's Tr.; and pp. 3-9, 19-23, 35-38, supra.)

POINT FOUR

That the detailed allegations of specific facts, in the form of the stenographic record, as appears from the above, and hereafter, are fully set forth in, and, as Exhibits, to said petition and affidavit to disqualify, and same are not statements of conclusions, but of facts. That said petition and affidavit to disqualify specifically state, in addition to the above specific acts and the detailed facts of said collaboration by the said Assistant United States Attorney, and the trial judge, in and about the execution, approval and carrying out of said agreement in favor of the respondents and against these petitioners, which occurred prior to the beginning of the purported trial, and knowledge of which did not come to petitioners or their counsel until two days before the filing of the said petition and affidavit to disqualify and which were sufficient to and did establish that the mind of the trial judge was personally biased and prejudiced against these petitioners, and that on that account the said purported hearing was not a judicial trial, and that the Circuit Court of Appeals erred in overlooking the above and in according the said proceedings and purported judgment the consideration, weight and effect which are properly accorded to the proceedings of a court conducted by a qualified judge. (Pp. 19-20, 36-37, supra; 481-482, 512-546, V. I, 748, 750, V. II, Clk's Tr.; and 68-75, Appellants' Brief, V. I, Appendix hereto.)

That in addition to the instances set forth on pages 3 to 8 and 18 to 23, *supra*, the verbatim record of a sufficient number of said unprovoked, repeated, hostile, and oppressive acts, statements, threats and charges on the part of the trial judge, all of which were fully set forth in said petition and affidavit to disqualify (V. I, pp. 512-546, Cl. Tr.; pp. 1338-1340, V. II, Cl. Tr.; pp. 10-23, same; pp. 82-97, Appellants' Brf. and pp. 4-55, Pet. for Rehear., V. I, Appendix hereto) are here presented to clearly establish the existence of such bitter feeling, animosity, and personal bias and prejudice on the part of the said trial judge against these petitioners, and in favor of respondents, as to preclude, as same did in fact preclude, petitioners being accorded a fair and orderly hearing; and to divest the proceeding in which petitioners sought to present their case herein of all the characteristics and semblance of a judicial hearing and proceeding; and to conclusively evidence such disturbed mental condition as to render said trial judge incapable of fairly considering and weighing the evidence on the part of petitioners.

WADE KILCREASE, full-blooded Creek Indian, more than 76 years of age, being a material witness on behalf of these petitioners, had testified in substance that he was personally acquainted with Billy McCombs, a preacher, who lived close to Tuskagee Church in the Creek Nation, about 7 miles from Eufaula, and that while a boy Jackson Barnett lived with said McCombs about the time the Katy Railroad was built (1872); that he thereafter lived about in that community; that said Jackson Barnett belonged to the Tuckabatchee

Creek Town and the Bear Clan; that he knew Sinda Colbert, who lived near Tuskagee, and that later the said Jackson Barnett was her husband; that witness went to school near there (pp. 4744-4746, V. 10, R. Tr.); that said Jackson Barnett and Sinda had one child, a boy; that they went to church together and slept together (pp. 4751, Vol. 10, Rep. Tr.). *This witness was in no manner impeached, and his evidence was not in any particular contradicted by either oral or documentary evidence, however while so testifying, as is fully set forth in said petition and affidavit to disqualify the trial judge, the following proceedings, among others, were had:*

"The Court: Now he was only ten years old.

Mr. McPherren: Your Honor, I am presenting the evidence of the witness.

The Court: I am just telling you.

Mr. McPherren: I think Your Honor will see this man knows what he is talking about.

The Court: He didn't know so much about that case I tried down there."

(Reference is to a case tried at Durant, Oklahoma, in which Wade Kilcrease had stated to the interpreter that he was a witness and Judge Williams was the judge and that the judge still owed his witness fees.)

"Mr. Gibson: *General McPherren didn't tell him about that*" (pp. 4749-5150, Rep. Tr.).

(Obviously, this is a direct insinuation that McPherren had told the witness about other parts of the witness' testimony. This improper and unfair statement was not rebuked by the trial judge. As appears from the

record of the proceeding during the portion of the two days these appellants, petitioners, were attempting to introduce evidence, which record is embodied in said petition and affidavit to disqualify the trial judge, counsel for the said three groups, respondents herein, and for other claimants, abetted, encouraged, assisted by the trial judge, repeatedly attacked said counsel and the witnesses on behalf of these petitioners.)

"The Court: What church did he ever see them sleeping together? (Interpreter Alexander was interpreting.)

Interpreter Wiley: That is not asking the question.

The Court: At what church did he ever see them (Jackson Barnett and Sinda) sleeping together. That is what I asked him" (p. 4751, same).

(The court was using two interpreters, Wiley and Alexander, furnished by the Indian Agency in the examination of these old Creek Indian witnesses of petitioners, and said interpreters added somewhat to the great confusion by repeatedly challenging the correctness of their respective interpretations.)

A. "At Tuskegee.

The Court: Whereabouts were they sleeping together at the church?

A. Just a little south of Tuskegee in a little dwelling.

The Court: Who else was in there sleeping?

Interpreter Wiley: That is not the question either. He is asking him who else saw him.

The Court: Who else was there sleeping in the house?

A. Don't know the name. Don't remember the name.

The Court: Whose house was that where they were sleeping?

A. I have forgot it, too.

The Court: But he hasn't forgotten that he saw them there sleeping together. Ask him why he remembers that so well and don't remember the other.

A. All in one room. Anybody has a right to look around everybody sleeping in one room.

Q. Did you ever see Jackson Barnett at Chowee Colbert's?

Mr. Gibson: We object to that as leading and suggestive."

(Whether the objections were or were not well founded, and although the witnesses were full-blooded Indians, who understood no English, and were being examined through the use of interpreters, who were not well qualified, counsel for the said group, respondents herein, soon after these petitioners commenced the introduction of evidence, began the course of interposing repeated objections that the questions propounded to interpreters by counsel for the petitioners were leading and suggestive. It should be noted that such objections, although without merit were invariably the basis of attacks either on the witness or counsel for these petitioners, or both, of such nature as to conclusively evidence hostility on the part of the trial judge.)

"The Court: **If you get it out on a leading question I wouldn't believe it. I am not so sure I will believe him anyhow.**

Mr. McPherren: That is a matter for the court to determine and it is not before us at this time.

The Court: Tried before me—

Q. Where did Sinda live, if you know?

A. Little south of Tuskegee Church.

Q. Did Sinda ever live with Joe Colbert?

Mr. Gibson: Objected to as leading and suggestive.

The Court: I sustain the objection.

Mr. McPherren: Exception. Will Your Honor permit him to answer the question, or do you want me to state?

The Court: No, I won't let you state and won't let him answer.

Q. Do you remember as to whether or not you saw Jackson Barnett at Chowe Colbert's?

Mr. Gibson: We object: leading.

The Court: **Needn't answer that. I have ruled on that. It is in the record. I think this is a witness that the court should not permit to be led. You may put that in the record."** (P. 4756, same; pp. 23-28, appellants' brief and pp. 6-10, pet. for rehearing, V. I, appendix hereto.)

(In the situation presented the questions propounded to the interpreters and to which said objections were interposed and sustained in the usual harsh, hostile, and insinuating manner were not leading and suggestive, and it is perfectly apparent from the record that no useful purpose could be served by attempting to further examine the witness.)

ROBERT KELLEY, a full-blooded Creek Indian, 87 years of age, an important witness on behalf of these petitioners, testified in substance through the interpreters, that he personally knew Billy (William) McCombs and Joe (Chowe) Colbert at the time the Katy Railroad was built (in 1872); that the family of Joe Colbert later consisted of Thompson Colbert, his nephew, Sinda Colbert, and Jackson Bar-

nett, then a young man who was a member of the Tuckabatchee Creek Town, and was married to said Sinda, the niece of Joe Colbert; that he did not know the age of Jackson Barnett while he lived at Joe Colbert's, but he was old enough to be married; that Jackson Barnett told witness that he was married to Sinda; that Joe Colbert, the uncle of Sinda, also told witness that Jackson Barnett was married to Sinda; that witness saw them going to church together; that witness at that time lived about 4 miles from Joe Colbert; that Jackson Barnett and Sinda were at Joe Colbert's when the child (Albert Brady) was born (pp. 4764-4767, V. 10, Rep. Tr.); that he went to Texas some time later and stayed ten years with his uncle and then returned to Eufaula, Creek Nation, and that about three years later he visited Leecher's Ferry, and that Jackson Barnett was staying there; that he had known Leecher for a long time; that later he saw Albert Brady at the home of Siah Barnett, and that he asked Siah Barnett who Albert Brady was, and that Siah Barnett told him that Albert Brady was the son of Jackson Barnett (p. 4775, Rep. Tr., V. 10). (This is the Siah Barnett who it is admitted by respondents was the father of Jackson Barnett.)

This witness was in no manner impeached, and his evidence was not in any particular contradicted by either oral or documentary evidence, however while so testifying, as is fully set forth in said petition and affidavit to disqualify the trial judge, the following proceedings were had:

"The Court: Ask him how he knows (Jackson Barnett and Sinda) they were married.

A. He was there and saw them and the young lady said—

The Court: Who said?

A. Said the young folks said they were married.

The Court: Ask him if he ever heard Sinda or Jackson say they were married.

A. He heard when he was there—(Interpreter did not finish interpreting answer).

The Court: I want to know if he ever heard Sinda or Jackson say they were married—

The Court: **He will answer my question first. Now ask him to say whether he ever heard Jackson or Sinda say they were married. He can answer that if he isn't a contrary witness. Now he seeks to evade by saying somebody else. That shows he is a contrary witness. He understands English. He has testified before me in this court in other cases."**

(The trial judge confused this witness with Wade Kilcrease who had theretofore testified.)

"He knows whether he ever heard either one of them say that. You can hear me. You have testified before me.

The Interpreter: **He is telling what he saw and not what he heard.**

The Court: **You tell him to answer what he heard. If he don't I will put him in jail. That is whether he ever heard Jackson or Sinda say whether they were married to one another, and for him to answer the question. I won't let him testify further in this case, and I will commit him to jail.** (Pp. 4766-4767, same.)

A. Jackson told him himself that he had married Sinda and he saw them going to church together—

The Court: **Ask him why he said he would tell what he saw and not what he heard. I heard him say that. So he**

falsifies himself right here in court. (P. 4767, V. 10, same.)

A. Said he couldn't tell without seeing. Had to see before he knew what he was about to tell.

The Court: He ain't worried any—

The Court: He explained to the interpreter he was going to tell what he saw.

Mr. McPherren: He understood that is what you wanted.

The Court: He probably understood what you wanted.

Mr. McPherren: Your Honor please, I don't like those insinuations. I am an honest practicing lawyer.

The Court: Yes, but you are not the only man connected with these cases."

(What, if anything, this purported justification means is unknown to us. It is clear from the record that nothing had occurred in any of the instances to serve as provocation for the insinuations, charges, and attacks by the trial judge. A pertinent question is as to what was the moving cause or motive of such repeated attacks, and the evident mental bias of said judge.)

"By Mr. McPherren: —**But you see what I want. I don't want anything out of him but to answer my questions—**

The Court: **I understand. With these kind of cases there sits an interpreter and there sits a scoundrel to bring this evidence in here. I see that. I have had them all these years and I weigh this evidence with all skepticism."**

(Referring to Sim L. Liles, who was employed to assist in assembling and presenting evidence on behalf of petitioners, two inexperienced restricted Indian women, and who was not a witness and in no other man-

ner participated in the trial of the case and against whom no evidence of misconduct was presented.)

Mr. McPherren: **Why do you persist in charging**—(P. 4768, V. 10, Rep. Tr.).

The Court: **You keep on persisting on these questions. Go ahead."**

(Note: What questions?)

Mr. McPherren: I want to ask him this question: State who you heard other than Jackson Barnett say that he and Sinda were married, if any one, that lived there at Joe Colbert's?"

(Mr. Alexander succeeded Mr. Wiley as interpreter.)

A. "Yes.

Q. Who?

A. All the neighbors around there (p. 4769, V. 10, Rep. Tr.).

The Court: Was that one called Charlie also called Jackson sometimes?

A. I knew Jackson Barnett as Jackson Barnett and not Charlie Barnett (p. 4770, V. 10, Rep. Tr.).

The Court: **That is not answering the question. The question was asked and he is going to answer my question. Understand? He is smarter than he claims to be. He has testified before me before. I want to know if that man he called Charlie Barnett was also sometime called Jack or Jackson Barnett. Now he can answer that yes or no or state he don't know.**

Interpreter Wiley: There is one word he (Alexander) is putting in. He was called either Jack or Jackson and the interpreter says one word Jackson.

A. Charlie Barnett is different man.

Q. Was he (Charlie Barnett) ever known as Jack or Jackson Barnett, or do you know that?

A. No—"

(Although the fact had not yet developed in the proceeding, Fisher's Exhibit No. "20" being the first record prepared by the Dawes Commission relating to Albert (Barnett) Brady (Sewell) erroneously recites that Albert Sewell (Brady) was the son of Sinda by her first husband, *Charlie Barnett,* and said record was later corrected by the Dawes Commission in Brady Ex. No. "5", being the census card of Albert and Dora Brady, and made to correctly recite that *Jackson Barnett* was the father of Albert Brady; however the erroneous statement as to the death of said father was not corrected (pp. 125-126, appellants' brf., V. I, appendix hereto). Clearly the trial judge had in some manner learned and had in mind this erroneous statement as to the parentage of Albert Brady, the father of these petitioners in making the last above inquiries and same was made in the interest of respondents.)

Q. "—How long did Jackson Barnett live there about Chowe Colbert's?

A. I wouldn't know how many years, but he was there when the child was born. He told me himself.

The Court: He has that child on his brain. That shows it. When I ask him anything he is obtuse he can't get that out of his head. That is the way to weigh evidence. I know. He has been in this court before. When he tells he wasn't paid he was probably subpoenaed as a witness.

Mr. McPherren: That was a different man. (Wade Kilcrease.)

The Court: Maybe the man didn't pay his witness fees.

Mr. McPherren: He (Wade Kilcrease) thought he was being funny. (P. 4771, V. 10, Rep. Tr.)

The Court: Oh no, he ain't that smart—

Q. —Where was Jackson Barnett when he told you about this child?

The Court: Didn't he say he met him at Leecher's Ferry?

Ask him how long he had been back from Texas before he met him at Leecher's Ferry.

A. About three years after my return from Texas.

The Court: Whose return?

A. (By interpreter): His return.

The Court: **He testified Jackson Barnett went to Texas and stayed ten years.**

Mr. McPherren: **No, Your Honor.**

The Court: **Well that would be thirteen years. That would be 1885 or 1886 when he saw him at Leecher's Ferry.**

Mr. McPherren: **He didn't testify Jackson Barnett left the Indian Territory.**

Mr. Crump: **We agree**—" (P. 4773, V. 10, Rep. Tr.)

(It is obvious from the repeated interruptions, the above being only one of many instances, on the part of the trial judge, of the examination of witnesses on behalf of these petitioners, by propounding questions unrelated to the examination, and the misunderstanding of the prior evidence of the witnesses testifying, that the trial judge bestowed little, if any, attention to the evidence being presented on behalf of petitioners.)

"The Court: Ask him when he came back from Texas where he went to.

A. Eufaula.

The Court: Then how come him to stay at Eufaula three years and then go up to Leecher's Ferry?

A. Said he went anywhere on a horse—

The Court: **This court has discretion about these matters and we are not going to have these obstinate witnesses and monopolize the time of the court.**

Q. How did he happen to be at Leecher's Ferry? Did he know John Leecher?

A. Just visiting—

The Court: How long had he known Leecher?

A. Long time—

Q. When you came back did you get acquainted with a man by the name of Albert, Albert Brady?

A. After I came back from Texas I stopped at Siah Barnett's house and asked if that was his son. He said no that was a son of Jackson Barnett.

Q. Who were they talking about?

A. Albert Brady.

The Court: **Was Albert Brady grown then?**

A. **He was a grown man.** (Pp. 4775, V. 10, Rep. Tr.)

The Court: **He has testified he (Albert Brady) was born about the time he (Robert Kelly) left and he was gone ten years and he says now he was grown. The only way to catch up with his kind is to trap him.**

Mr. McPherren: **And not ask how long it was after he came back. (From Texas.)**

The Court: **Ask him whether it was before or after he made that citizen's right trip up to Leecher's Ferry.**

A. **After I came back from Leecher's Ferry.**

The Court: **How long after?**

A. **He figures about four years.**

The Court: **Then he (Albert Brady) would only be seventeen years old.**

Mr. McPherren: **That is about grown—**

The Court: **—I am not going to stand for all that. We are not going to take all the time of this court to fool with him. He understands the English language.**

Mr. Crump: **I think so, Your Honor, I wouldn't believe him either.**

Mr. McPherren: **I think that it is unfair to try to turn this court into a kangaroo court. You should sentence a man to jail for making that statement.**

The Court: **He has a right to say that. Anybody else want to ask any questions?**

Mr. Gibson: **I don't think so."**

Clearly, Mr. Gibson, representing the respondents nor any other reasonable person, would be of the belief that anyone should desire to "ask any questions." The trial judge and Mr. Crump had completely disposed of the witness, Robert Kelley, as being unworthy of belief, *and Mr. Crump had so stated, and the trial judge had closed the matter by stating that Mr. Crump had the right to so state.* Although the trial judge ordered the witness, Robert Kelley, out of the court room, *the judge had not finished with the witness, and as Robert Kelley was leaving the witness stand, further attacked the witness as follows:*

"The Court: **Ask him why he went to Texas and stayed ten years.**

A. **That was to visit my uncle, my father's brother named Tobe Kelley,** * * * etc. (P. 4777, V. 10, Rep. Tr.)

Q. (By Mr. McPherren): **You didn't run away from any crime, did you?**

Mr. Anglin (Representing respondents): **I just wanted to know. I have heard he never would tell."**

(It will be noted that the trial judge and not Mr. Anglin asked this question.)

Q. "(By Mr. McPherren): Had you violated any law when you went to Texas?

A. I am not a thief. Therefore, I don't live that way. I am full-blood Creek right today and nobody better than I am." (P. 4778, V. 10, Rep. Tr.) (The material evidence of the above witness is presented on pp. 28-35, appellants' brief and pp. 10-19, pet. for rehearing, V. I, appendix hereto.)

(This witness, as the record of his testimony reveals, was a proud, dignified old Creek Indian and resented the unseemly attacks upon him and declared to the interpreter "I am done" and the court ordered him out.)

It is not believed that the history of the administration of justice in this Country presents a more ruthless example of persistent effort on the part of a trial judge and counsel to intimidate a witness, and obviously the mind of the trial judge was in no condition to accord evidence on behalf of the petitioners any consideration or weight whatsoever.

THOMPSON COLBERT (pp. 4715-4741, V. 10, Rep. Tr.), a

full-blooded Creek Indian, age about 96 years, and a material witness on behalf of these petitioners, testified through said interpreters, in substance, that he knew Billy McCombs and Joe (Chowe) Colbert and Jackson Barnett; that Joe Colbert was his uncle; that Jackson Barnett when about fifteen years old was living at Billy McCombs'; that later Jackson Barnett lived at Colbert's; that Sinda Colbert, a niece of Chowe (Joe) Colbert, and several other young Indians lived at Joe Colbert's, who was an Indian judge; that Jackson Barnett and Sinda lived together and were the parents of Albert; that Jackson Barnett was a member of the Tuckabatchee Creek Town and Sinda was a member of the Hickory Ground Creek Town; that when Albert was about a year old Jackson Barnett left Sinda and went over on Cane Creek on the Arkansas River (Leecher's Ferry), and later Sinda went to live with her brother, Dick Colbert. Said witness was further interrogated and the following proceedings were had:

Q. "(By Mr. McPherren): **What kin was Sinda, Jim and Dick Colbert to Chowe Colbert?**

Mr. Anglin: **Your Honor, there are very few of his questions so far but what are leading.**

The Court: **Yes.**

Mr. McPherren: **I will change it then, Your Honor."** (P. 4718, V. 10, Rep. Tr.)

(The questions were not leading, but as appears McPherren unsuccessfully sought to avoid the ire of the judge.)

"The Court: **I never pay much attention to these kind of cases where they ask leading questions—**

Q. —Do you know who the father of Albert was?

A. Jackson Barnett was his father.

Q. How do you know Jackson Barnett was the father of Albert?

A. He was living there and made the child.

Q. How was he living there?

The Court: Ask him who told him.

A. **Those folks at home.**

The Court: **That don't amount to anything.**

Q. **What folks?**

The Court: **You may prove possession by hearsay, but you can't prove procreation by hearsay. Ask him what folks told him that."**

(Of course, this ruling is erroneous and no doubt had the mind of the trial court been in its normal and unprejudiced condition, such ruling would not have occurred. While the witness was permitted to answer the question, it is evident that the trial judge gave the evidence no consideration.)

Q. **"—Name the persons there at Chowe Colbert's home who said that Jackson was the father.**

The Court: **Who said Jackson made him. That is what he said.**

A. **Medilla Colbert.**

Q. **Who was she?**

The Court: **So she told Jackson made that kid, is that what you meant?**

A. **Yes.**

The Court: **Do you contend old Jackson and that woman were married (Jackson Barnett was about 21 years old at that time)?**

Mr. McPherren: **Yes, sir, they lived together. The record shows Jackson Barnett is the father. (Of Albert Brady.)**

Mr. Gibson: **And also dead.**

Mr. McPherren: **We will show you that was an error. Said he was a member of Hickory Ground Town, and he wasn't. (All the witnesses testified he was a member of Tuckabatchee Creek Town.)**

The Court: You will have to prove common law marriage."

(This ruling that petitioner, Dora Brady, was required to show that her grandfather, Jackson Barnett, and grandmother, Sinda Colbert, were married according to the common law is erroneous, and the later finding of the trial court that there was no evidence of such marriage of Jackson Barnett and Sinda Colbert, is likewise erroneous, for the reason that "Brady's Exhibit No. 5", being the census card or enrollment record of Albert Brady and Dora Brady, recites that Jackson Barnett and Sinda Colbert were the parents of Albert Brady, *and it is well settled that it follows from said statement that the presumption is that the stated parents were married and that Albert Brady was a legitimate child.* See authorities cited and discussed on pp. 170-174, original brief of appellants herein, V. I, Appendix hereto. Clearly in approving the said finding and conclusion of the trial court, the Circuit Court of Appeals erred.)

Q. "(By Mr. McPherren): How old did you say Jackson

Barnett was when you first knew him up at William McCombs'?

A. About fifteen years old.

Interpreter Wiley: I don't think he (the other interpreter, Alexander) got the question right, there.

Mr. McPherren: Your Honor, are we going to have this trouble?

The Court: Yes (p. 4735, V. 10, Rep. Tr.).

Q. Jackson Barnett. Does he state that Jackson Barnett was a young man when he first knew him at Billy McCombs'?

A. Yes, sir.

Q. And now how long did he live at Billy McCombs' before he came over to Chowe Colbert's to live?

A. About two years.

Q. Then he was two years older than being a grown man when he went to Chowe Colbert's?

A. Yes.

Q. Then was it a mistake when they understood you to say he was only five years old when he went to Colbert's?

A. Yes, that is my mistake (statement by interpreter).

Q. Who was the older?

Mr. Anglin: You say that was 'my' mistake?

The Interpreter: Yes." (P. 4736, V. 10, Rep. Tr.)

It is evident that these interpreters were incompetent and could not secure answers to questions other than the most direct and that even with direct questions the result was doubtful. In such situation the following occurred:

"Mr. Richardson: **Your Honor, please, Mr. McPherren said he was going to discontinue leading questions.**

The Court: **I figure he has the witness fixed.**

Mr. McPherren: **No, Your Honor.**

The Court: **That is the way I do. I don't pay any attention."** (P. 4722, V. 10, Rep. Tr.)

Clearly, this and other statements of the same import, is an affront no man worthy to practice at the bar should be required to suffer at the hands of a trial judge. *It was not even suggested that any reason or provocation existed for the repeated hostile and oppressive acts, statements, threats and charges on the part of the trial judge against petitioners and their counsel and witnesses, other than the unfounded claim that leading questions were asked, except the personal prejudice engendered in the mind of the trial judge as the result of the negotiation, execution and approval of said agreement or family settlement as is alleged in said petition and affidavit to disqualify said judge.* The above quoted record, and other records, which will be hereinafter presented, reveals that this cause of conduct toward said attorney and witnesses for the petitioners was pursued by the trial judge herein until the effort to present evidence in said proceeding on behalf of these petitioners was finally abandoned. **Certainly, the Circuit Court of Appeals must have overlooked the record acts and statements of the trial judge, fully presented in said petition and affidavit to disqualify, and in the briefs filed in said Court (V. I, Appendix hereto), as it is believed no unbiased mind could conclude that said trial judge was not thoroughly and personally**

prejudiced against these petitioners and in favor of the respondents and utterly disqualified to hear and determine any issue herein between petitioners and respondents.

Bearing in mind the fact that the three above witnesses, Wade Kilcrease, Robert Kelley, and Thompson Colbert, were full-blooded Creek Indians, ranging in ages from seventy-six to eighty-seven years; wholly disinterested in this proceeding and unchallenged and uncontradicted in any particular, *except said attacks on the part of the trial judge and counsel for respondents;* and bearing in mind the further fact that a normal mind does not engender such hostile actions without a moving cause, motive, or objective, and there being none other suggested in the proceeding, *it was and is earnestly believed that the belief that said judge was so disqualified, on the part of the petitioners, and their counsel, based on said hostile acts, and the then recently acquired knowledge that the trial judge had participated in the said negotiation, execution, and carrying out of said agreement or family settlement* (pp. 3-9; 19-21, *supra*) *is both reasonable and sound.*

DORA BRADY, one of the appellants and petitioners, among other things, had testified that Albert Brady was her father; that she was born September 17, 1899, in the Creek Nation; that her father told her that Jackson Barnett, a Tuckabatchee Creek Town Indian, who lived around Henryetta, Oklahoma, was her grandfather; that she and her father went to visit her said grandfather when she was about eleven years of age (1910); that she did not talk to her grandfather, but that Albert Brady, her father, talked

to him; that she saw her grandfather, Jackson Barnett, after that two or three times (pp. 4979-4983, V. 10, Rep. Tr.); witness went to Sacred Heart (Catholic School) from 1914 until 1918, and communicated with her father, Albert Brady, every week. *During that time and in 1917 she received a newspaper clipping from her father through the mail (Brady Exhibit I, p. 4782 same); the newspaper clipping sent by her father in 1917 had a picture of her grandfather in the left-hand corner and underneath it was "Jackson Barnett", Brady's Exhibit No. I, p. 4984, same).* (See reproduction between pages 122-123, original brief of these appellants, appendix hereto; that witness was living at Claremore when her grandfather, Jackson Barnett, was kidnapped by the white woman, and read about the occurrence in the newspaper and discussed same with her father, Albert Brady, and Nora Pearson (Vol. 10, pp. 4878-4986); witness was at Los Animas, Colorado, when she learned her grandfather, Jackson Barnett, was dead (p. 4986, same); got that information on June 29, 1934, and wrote a letter to Muskogee on June 30, 1934, and received a reply identified as Brady's Exhibit No. 9 (p. 4987, same).

Dora Brady (pp. 8651-8656, V. 18, Rep. Tr.) *was thereafter called as a witness by counsel for respondents, in the purported trial of the issue said counsel had raised, on direction of the trial judge, as to the truth of the record facts alleged in said petition and affidavit to disqualify said judge, and was interrogated by said judge and counsel for respondents* as to her place of residence since she filed her interpleader herein; when she first met Sim L. Liles; how she

first heard of the death of her grandfather, Jackson Barnett (p. 8651, same); how she financed the trip from Nevada to Oklahoma to file her intervention herein; how she financed the preparation and presentation of said intervention; and in this connection the trial judge asked and was answered as follows:

Q. "Who financed you after you came to Oklahoma?

A. Well, I financed myself. When I came here I had right around $100.00. And after I got in the case and needed money, Mr. Davis helped me along.

Q. How much has he given you?

A. I don't think very much because I have been working over here for my room and board—" (p. 8652, same).

Dora Brady was further interrogated as to why she returned and the terms of the contracts she has executed with her attorneys and others for service in preparing and presenting her intervention (pp. 8652, same); where she has lived since returning to Oklahoma to intervene herein; and both the trial judge and counsel for respondents attack her moral character as follows:

A. "Well, he (Sim L. Liles) sent me a picture. My little baby picture and told me if I was that woman he would like to communicate with me, if I wasn't to send it back to him.

Q. Then you wrote him?

A. No, I came to Oklahoma.

The Court: Who was the sheriff (p. 8652)?

A. Jim Smith.

The Court: Did you have any talk with Jim Smith before you received that letter?

A. I knew Jim Smith since 1928.

The Court: Whereabouts?

A. Fallon, Nevada.

The Court: Did you sign a contract?

A. Yes, sir.

The Court: **Have you got a copy? (Later the judge required a copy to be introduced in evidence.)**

A. **Yes, sir, I have, but I don't think I have it with me—**

Q. **—You are living at Sim's (Liles) house?**

A. **I am staying out there, yes.**

Q. **How long have you been there?**

A. **I think it was the last of July or in August, 1938.**

Q. **Had his wife already left him?**

A. **Yes, but I was out there long time before she left their house.**

Q. **Sim and his wife had a row about you?**

A. **No, sir. His wife went to California on account of his daughter being sick—**

Q. **—You just live there with Sim alone?**

A. **No, there is nobody there.**

Q. **And that has been going on six or eight months?**

A. **Little over a year.**

Q. **Do you plan to remain there with him?**

A. **Not any longer than I have to.**

Q. **Not planning on getting married?**

A. **I should say not" (p. 8653, same).**

(What was the purpose of this examination? The reason will appear later.)

Further the said trial judge and said counsel for respondents interrogated said Dora Brady as to *why she made affidavit to disqualify the trial judge* (p. 8653, same); *what attorney she saw when she returned to Oklahoma* (p. 8656, same).

SIM L. LILES, who was employed by Judge E. C. McMichael on behalf of petitioner, Lucinda Watashe, to aid in locating her half-sister, Dora Brady, and afterwards employed to aid in investigating the facts, locating and assembling witnesses and evidence on behalf of petitioners, who as inexperienced Indian women were incompetent to perform said service in their own behalf, and said Liles not being a witness on behalf of petitioners, was called and required to testify on behalf of respondents in an effort of respondents' counsel to establish their issue and contention that the facts alleged in said petition and affidavit to disqualify the trial judge were untrue. As such witness on behalf of respondents the said Liles was questioned principally by the trial judge, assisted by counsel for respondents (pp. 8630-8647, V. 18, Rep. Tr.) as to what caused him to come to Court on that day; what connection he had with the claim of petitioner; who employed him, and was required by the trial judge to produce his contract of employment; who advanced expenses, and who was Judge Burt; who was E. A. Davis, who advanced same expenses and as to the amount he was to get out of it; if he contacted

McMichael and McPherren about his contract and where; as to whether he had an office and as to his business; who was his lawyer; as to whether a man in Tulsa, Oklahoma, contributed to the expenses; who else other than the lawyers will receive an interest in the estate (pp. 8630, 8634, same); where is Dora Brady living and how long has she lived with witness; does she pay board; are you a married man, and as to whether his wife is at home; whereabouts of his children; as to whether when Dora Brady came in, his wife got out; as to how witness located Dora Brady for Judge McMichael; where and how long before she returned; who filed the intervention petition for Dora Brady and Lucinda Watashe; how long was it after Lucinda filed before he heard from Dora Brady; how it happened he wrote a post card to the sheriff inquiring about Dora Brady; how the sheriff replied to the inquiry; how it happened witness thought to write to Nevada; did witness sent a card to Colorado, too; did he pay Dora a salary; as to witness promoting these claims; as to who employed the lawyers, as to whether petitioners employed lawyers before they contacted witness; as to witness having charge in the main of locating and assembling the evidence; as to time spent by witness in so doing; as to who was the interpreter (pp. 8634-8642, same); that Dora Brady did not know about this litigation until you located her or until you wrote the sheriff to contact her; that you, yourself, caused Dora Brady to return to Oklahoma and intervene in this case; inquired as to whether Lucinda Watashe, supposedly the half-sister of Dora Brady, had al-

ready employed a lawyer at the time of said inquiry, and who was that lawyer (pp. 8643-8644, same).

J. C. Stone, representing the respondents, closed with the following interrogatories:

Q. "(By Mr. Stone): Just tell the court why you have Dora Brady at your house now.

A. Well, that is a short story. She hasn't any home here; no place to stay; no money. She don't have a brother or sister, father or mother, and she has no money—

Q. —You made an affidavit, did you not, to disqualify the trial judge in this case?

A. Me?

Q. Yes, sir.

A. I never heard of it.

The Court: I don't think he signed it * * *"

Since Liles was not a witness for petitioners and did not sign or have any part in filing the said petition and affidavit to disqualify the trial judge, why did counsel for respondents call him as a witness and why did the trial judge and counsel violate the rules of evidence and outrage decency by such examination? The basic reason for the above vigorous and unwarranted attacks on Liles on the part of the trial judge and counsel for respondents was their evident belief that Liles was responsible for the return of Dora Brady, and for the petitioners filing the interventions herein, and for the presentation of the evidence of the numerous disinterested and unbiased witnesses which clearly establish the fact that petitioners are the granddaughters and the

heirs to the estate of the said Jackson Barnett, deceased. This fact is conclusively shown by the examination of Dora Brady, Mary Davis, and Sim L. Liles by the said judge and counsel presented above and specifically by the following:

Asked of Dora Brady:

Q. "**(By Mr. Stone) If it hadn't been for Sim Liles looking you up you never would have been a party?**

A. **Yes, I would if I could have got an attorney to take it for me." (P. 8654, V. 18, Rep. Tr.)**

Asked of Mary Davis:

Q. "**(By Mr. Gibson) Do you know Sim Liles?**

A. **Yes, sir.**

Q. **Don't you know Sim Liles has been working in this case since the time your daughter intervened about two years ago?**

Mr. McPherren: **That is objected to as incompetent, irrelevant and immaterial.**

The Court: **I will let him bring it out.**

A. **No, sir, I did not.**

Q. **You knew he was working on it when you saw him first?**

A. **Yes, sir.**

Q. **Do you know who employed him?**

A. **I do not." (P. 4802, V. 10, Rep. Tr.)**

Inquiring of Liles to the same effect, and that he performed the principal part of the work in and about locating

witnesses and presenting evidence on the part of petitioners. (Pp. 8639-8640, V. 18, Rep. Tr.)

The only conclusion that can be reasonably deduced from the above examinations by the trial judge and counsel for respondents, relating wholly to immaterial matters and revealing animosity, is that same were based solely upon unreasoning resentment because of the said course of action on the part of petitioners and Liles, and were apparently bottomed on the belief that such course was violative of the rights of respondents.

MARY DAVIS, formerly Brady, the second wife of Albert Brady, who were the mother and father of the petitioner, Dora Brady, was a material witness on behalf of petitioners and testified in substance that she married Albert Brady in February, 1898, and that petitioner, Dora Brady, was born to them in September, 1899; that Jackson Barnett, deceased, whose heirs are being determined herein, and a member of the Tuckabatchee Creek Town, was the father of Albert Brady, and that Sinda Sewell, formerly Colbert, was his mother; that Jackson Barnett was Sinda's first husband and Parney Sewell was her second husband; that Albert Brady had lived with Andrew Brady, who was the stepfather of said Parney Sewell, who married Sinda, Albert Brady's mother; that it was because Albert lived with Andrew Brady that he took the name Brady instead of Barnett; that Albert Brady and Jackson Barnett, his father, visited each other after her marriage to Albert Brady, and until 1912 when she was divorced from Albert Brady. (V. 10, pp. 4787 to 4797, Rep. Tr.)

At this juncture in the examination of Mary Davis, the Court took over the examination as follows:

"The Court: **I want to find what interest you have?**

A. **Dora is my daughter.**

The Court: **She is an intervenor?**

Mr. McPherren: **Yes.**

The Court: **I just wanted to find that out, see whether she had any motive to fabricate. I will dig into it.**

Q. When was the next time you saw Albert Brady (Jackson Barnett)?

A. Jackson Barnett?

Q. Yes.

The Court: **I have found out a long time a fifth of the evidence is perjury.**

A. **1899.**

The Court: **That is the reason I dig into it. (P. 4793, V. 10, Rep. Tr.)**

(No effort was made to impeach this witness, and the evidence of this witness is in no manner contradicted. Why this insult from the bench?)

Mr. Gibson (representing respondents): **Who were the first lawyers you and she had in this case?**

A. **I never did have no lawyers.**

(The insinuation that Dora Brady or Lucinda ever had a lawyer in this proceedinng except Judge E. C. McMichael and Grant Foreman is unfounded, and the purpose of the insinuation was clearly to further arouse the devastating ire of the trial judge against these petitioners and, as appears, it succeeded.)

"Mr. McPherren: **What is the purpose? (The trial judge did not permit an answer.)**

The Court: **I will let it all come in. I have seen these cases. I don't blame the lawyers for being hired. I had one case where I thought one man was financing two interveners, and I decided against both of them on that. (P. 4803, Vol. 10, Rep. Tr.)**

Mr. Gibson: **We have one man financing three branches.**

Mr. McPherren: **Your Honor, that is not proper here.**

Mr. Gibson: **Not against you. (Then what was the purpose? However the record is to the contrary.)**

The Court: **It is impossible to prejudice me. I watch everything just like a hawk.**

Mr. Gibson: **Do you know who the first lawyers were that filed this suit?**

A. **I do not."**

(The above stated attorneys at all times represented petitioners. See V. I, pp. 308, 427 to 430, Clk's Tr., where original intervention of the petitioners, Lucinda and Dora Brady appear.)

Counsel for respondents, the appellees, were not satisfied with the result of the above attack on the petitioners, petitioners' counsel, the witness, and recalled the witness, Mary Davis, the mother of petitioner, Dora Brady, and perpetrated the following:

Q. "**(By Mr. Gibson) You were on the witness stand yesterday?**

A. **Yes.**

Q. **And have been called as a witness again this morning? Have you talked to General McPherren since you came in court this morning?**

A. I have not.

Q. Have not spoken to him at all?

A. No, sir.

Mr. McPherren: Your Honor, I want to register a protest against the general assumption (of misconduct) here.

The Court: Yes, unless you have some evidence of it. Now you have officers out there that ought to be on the alert and you could have found that out before asking this question."

(What "officers out there" did counsel have, and what "evidence" were they supposed to secure and pass on to counsel for respondents? How did the trial judge know all about said referred to "setup"? What did all this have to do with the attorney of petitioners talking to one of the witnesses of petitioners? The answer is that officers representing the F. B. I. were cooperating with counsel for respondents, and the acid test was being applied to all opposing parties and their witnesses. (Pp. 31-32, Appellants' Answer and Reply Brf., Vol. I, and pp. 83-84, Appellees' Answer Brf., Vol. II, Appendix hereto.) That the trial judge was in close touch and cooperation in the performance of the task of the said F. B. I. representative is clearly evidenced by the action of the said trial judge in, on his own initiative and motion suggesting the introduction in evidence a list of the persons indicated through the efforts of the said representative, as the record shows, to-wit:

"The Court: * * * If you want to you can include their names, style of the case and numbers and verdict of the jury. And where they haven't been tried that indictments have been returned, the number and style, and that they haven't been disposed of.

Mr. Pinson: **I can't see the materiality.**

The Court: **Except you are sort of striking at me about that when I was talking about having a grand jury. That has been done. * * *" (Pp. 8830, Vol. 18, Rep. Tr.) (Counsel for respondents presented the list and same is an exhibit.)**

(The fact that neither the petitioners nor any of their witnesses were among the parties indicted does not militate against the evident fact that had any excuse been available such indictments would have been secured.)

Thereupon the following occurred:

"Mr. McPherren: **I have sat here—(and submitted to insinuations and indignities too long). I want to protest against this trial proceeding under such conditions as render it impossible for me to represent the interests of my clients.**

The Court: **No, it ain't. You are mistaken about that. I told these witnesses that they had a right to talk to you. (P. 4870, V. 10, Rep. Tr.)**

Mr. McPherren: But they assume and the court seems to agree—

The Court: You have representatives here? (Who had what representatives?)

Mr. Gibson: If Your Honor please, I saw her come in with General McPherren, and that is the reason I asked for her.

Mr. McPherren: The officer reported that she was there (in the witness room) and I called her. (Gibson had asked for the witness.)

The Court: The attorneys must be courteous.

Mr. Anglin (representing respondents): Mr. Gibson meant

nothing against Mr. McPherren, and if so I do not join in it.

Mr. Gibson: Of course I don't.

Mr. McPherren: Knowing the atmosphere and attitude here I refrained from speaking to her.

The Court: **This don't help you. I don't believe anybody can prejudice me against any case. I believe I can try any case without any prejudice. Now ask her about the other things. (What other things?)**

The Witness: **May I speak?**

Mr. Gibson (representing respondents) **Yes. (Mr. Gibson had assumed command.)**

The Witness: **He (referring to General McPherren) said, 'We want you in the court room.'**

The Court: **That is not talking. (If it were talking what rule exists against counsel talking to the witness on the part of his client?)**

Mr. Gibson: **That is all that was mentioned?**

Mr. McPherren: **It was my duty to report (her presence).**

The Court: **That wouldn't be included in talking.**

The Witness: **I haven't talked to him (McPherren) since I was on the stand. I went to Coalgate and stayed over night and haven't spoken to him until just a moment ago."**

(Note: It is hardly believed that such an unwarranted attack on an attorney for a litigant ever before went unrebuked in a United States Court. The trial court was content to again reiterate his often-stated belief that "I don't believe anybody can prejudice me against any case." (P. 4871, same.)

(This old mother, observing the attack on McPherren, which was based on the immaterial and ridiculous charge that McPherren had talked to her since she had testified the day before, as McPherren had the right to do in that she was one of the witnesses of petitioner, Dora Brady, deemed it her duty to speak out and deny the truth of the attack. A most unusual and embarrassing situation and highly indicative of the fact that these petitioners were having no "day in court.")

HUGH HALE, a witness on behalf of these petitioners, testified in substance *that he lived near the Albert Brady allotment from 1901 to 1911, and that before and after that time he knew Jackson Barnett.* That Albert Brady often left Dora, his daughter, at the home of witness when he was required to be absent from home during the day, and on one of said occasions Jackson Barnett returned with him, and Albert Brady stated that Jackson Barnett was his father (pp. 4890-4896, V. 10, Rep. Tr. *It will be noted that this was ten years after counsel for respondents contend Jackson Barnett, the father of Albert Brady, died.* The trial judge took over the examination of the witness as follows:

"* * * The Court: When Albert introduced you to Jackson.

A. I just spoke to him. * * *

The Court: What did he say?

A. He said that was his son.

The Court: No, in response to your salutation saying 'how do you do,' what did he say?

A. I don't remember just exactly how he spoke the words.

The Court: What words did he use?

A. **He said 'that is my father.'**

The Court: **You have the son on the brain, apparently. I want to get the whole thing—when he answered your salutation where you bowed your head and said 'how do you do,' what did he say before he got to the son part of it?**

A. **I don't remember. * * *"**

(Who could remember exact words and order in which same were spoken 25 years in the past?)

"* * * The Court: **No, you don't remember that and I don't believe you either. If you were telling the truth you could tell the balance. That ain't on the brain and ain't vital * * *" (Pp. 4892-4893, Rep. Tr., V. 10.)**

(Why this attack?)

LUCILLE HIATT, as a witness on behalf of these petitioners, testified that her father, together with his family including witness, moved on the allotment of the petitioner, Dora Brady, *as a tenant in the fall of 1904 and that Albert Brady, the father of these petitioners, lived on his allotment which adjoined said allotment of Dora Brady. (It will be noted that this was 4 years after counsel for respondents contend that the Jackson Barnett, who was the father of Albert Brady, was dead.) That Jackson Barnett and Albert Brady came to her home on Dora Brady's allotment and ate some meals, and that Albert Brady told her and her family that Jackson Barnett was his father.* That witness saw a picture of the same man, Jackson Barnett, in the newspaper about the time it is said he was kidnapped (1920) (pp. 4814 to 4819, V. 10, Rep. Tr.) Said witness was further inter-

rogated and the following occurred:

Q. "* * * Was that the last time you saw him?

A. *No, he came back one more time with Albert and had supper with us.*

Q. Would you be able to recognize his picture? (P. 4817, same.)

A. I don't know. I might.

Q. Did you see any picture of this man that was there in the newspapers?

A. Yes, I believe I did.

Q. When?

A. The time he was kidnapped, I believe. However, I don't read the papers much.

Q. You saw his picture then?

A. Yes, sir.

Q. Was it the same man?

A. Yes, sir.

The Court: **Now you will have to submit many kinds of pictures. (No picture had yet been submitted to the witness.)**

Mr. McPherren: **I will submit all we can get hold of.**

The Court: **I won't pay any attention. That will convince me it is a frame-up they are just trying to change that Hickory Ground."**

(Why this insinuation of a frame-up?)

(The trial judge refers to the erroneous recital of Brady's Exhibit No. 5 that Jackson Barnett was a member of Hickory Ground Town. *That no Jackson Barnett ap-*

peared on the Hickory Ground Town roll, and that no Jackson or Jack that could have been the father of Albert Brady appeared on the Hickory Ground Town roll was shown both by the evidence of J. D. Fulton, the custodian of the said rolls (pp. 4923-4926, V. 10, Rep. Tr.) and by the certificate of the Commissioner to the Five Civilized Tribes, being Brady's Exhibit No. 8, p. 715, V. II, Clk's Tr.; pp. 48-50, 125-128 Original Brief of Appellants herein; Vol. I, Appendix hereto; but the trial judge declared he would pay no attention to the evidence.)

"Mr. McPherren: * * * She doesn't know anything about Hickory Ground.

The Court: The records show that Jackson Barnett of Hickory Ground was the father of Albert Brady. (One record so erroneously stated. Jackson Barnett lived in Hickory Ground area, but was a member of Tuckabatchee Town.)

Mr. McPherren: This witness doesn't know.

The Court: This will be for the purpose of showing a mistake in that by innuendo. Just take these frame-up pictures and show them to her. (Offering pictures introduced by other claimants.)

Mr. McPherren: This is a picture introduced by somebody else.

The Court: The way to do is take twenty-five pictures and say, pick out the one. (P. 4818, V. 10, Rep. Tr.)

(Of course pictures of Jackson Barnett for such a test were not available, but all that were available, were used.)

Q. * * * I hand you Brady's Exhibit No. 4, and I will ask you to state whether or not that looks like Jackson

Barnett did at that time, if not, what is the difference? (First picture submitted by petitioners to witness.)

A. At the time he was at our home?

Q. Yes.

A. The time he was at our house he had long hair, and he had a crease in his face.

Q. How about the face?

A. Apparently the face looks natural.

Q. Did you notice any peculiarity about his face?

A. Nothing but the deep creases, and he smiled a lot.

Q. Did you try to talk to him?

A. We talked to Albert and Albert talked to him.

Q. Did he talk much or little?

A. He talked quite a bit to Albert.

Q. Did he talk to you white people?

A. Not much—" (P. 4819, same.).

The disturbing effect of the hostile feeling and strong personal bias and prejudice on the part of the trial judge against these petitioners upon the actions and faculties of the trial judge with reference to evidence and proceedings on behalf of these petitioners is further well illustrated by the following: *R. C. Mason had testified that in 1917 he was interested in ascertaining the identity of the heirs of one Yargee, and that he was informed that Jackson Barnett, whom he had known since about 1914, and who lived in the vicinity of Henryetta, Oklahoma, was related to said Yargee and probably could furnish pertinent information (pp. 8676-8677, V. 18, Rep. Tr.); that he saw Jackson Barnett at the*

home of Timmie Randall, not far from Henryetta, and that through the use of an interpreter talked to Jackson Barnett about his and Yargee's family relations. The following questions and answers, among others, were asked and given and proceedings had:

Q. "* * * What conversation did you have with him at Timmie Randall's with reference to his relatives?

A. I went out there to ask him about his relatives according to instructions I had from Billie McCombs, and took (p. 8679, same) an interpreter Kosar Brown; asked if he was related to Stephen Barnett the father of Susan Yargee. He said he might have been distantly related, very distant, blood relation.

(This is the Billy McCombs Jackson Barnett once lived with.)

Q. Did you have any further conversation with him with reference to his relatives at that time?

A. Yes, we asked if he had any children. He said he had a boy papoose long time ago; said he lived over west around Bristow. I asked him what his name was. He said his name was Albert.

Q. Did he say whether or not he (Albert) owned a farm?

A. Yes, he said he did have his allotment. He had a good farm.

The Court: Now that has been the criticism during this entire trial. Now you put in the mouth of this witness evidence that shows that Jackson Barnett is an incompetent, and which has been so found by this court in his findings; and which has been so found and adjudicated by Judge McCormick for the Southern District of California in the case involving the validity of that marriage; and so found by District Judge Knox of the Southern District of New York in the litigation as to the trust

fund, which was held by him to be void on the grounds of incompetency. Now when that is the background before this court I strike out that answer (p. 8680, same).

Mr. McPherren: Your Honor, what answer is it you strike? (The last question and answer above was read by the reporter.)

Mr. McPherren: Now, is that the answer you are striking or further above?

The Court: Read the one above that.

(The next to the last question and answer above was read by the reporter.)

Mr. McPherren: Now, Your Honor, it is no leading question.

The Court: I didn't strike that out.

(The last question and answer was again read.)

The Court: I strike that out that is leading.

Mr. McPherren: Exceptions.

The Court: Any question that can be answered yes or no is laid down by Greenleaf specifically as a leading question." (V. 18, pp. 8679-8681.)

It will be noted first, that none of the three questions can be reasonably classed as leading and suggestive; second, that opposing counsel had not objected to said questions on any ground; third, that the judge's challenge to and striking of the question were as the judge states, on the ground that Jackson Barnett had been repeatedly held to be an incompetent, and that he could not know and state that he had a son, and that the son owned a good farm; fourth,

that the trial judge's closing statement that the last question was leading was not only an afterthought, but was erroneous.

ALICE FOX, formerly Alice Brady, a full blooded Creek Indian, the first wife of Albert Brady, and the mother of the petitioner, Lucinda Watashe, formerly Brady, testified through the interpreter as a witness for said petitioner, Lucinda Watashe, in substance, that she was past sixty years of age and that Albert Brady was her first husband; that they were not regularly married, but were married by common law (Indian custom); that Albert Brady, before they were married, had lived at the house of her mother. (Pp. 4995-5000, V. 10, pp. 5001-5008, V. 11, Rep. Tr.) Thereupon the following occurred:

"Mr. McPherren: * * * We offer as Brady's Ex. No. 10, Creek Census Card No. 503, field No. 505, with reference to this witness * * *

Q. How old is your daughter, Lucinda?

A. Forty-two years old, I think.

Q. Now you stated that Albert Brady lived at your home before you and he were married or lived together. What, if anything, was said about your living together?

(No answer permitted.)

The Court: Ask her how old she was.

Mr. McPherren: (to interpreter): Just let her answer.

The Court: We are not going to have any leading. Ask her how old she was when she had a talk with Albert Brady. Ask her how old she was.

The Interpreter: With reference to their marriage?

The Court: How old she was before they had a talk about living together.

A. About twenty-five years old.

The Court: She was about twenty-five?

A. Yes, I don't know exactly." (P. 4997, V. 10, Rep. Tr.)

(The trial judge then proceeded to incorrectly and confusedly construe said census card and erroneously announced the conclusion that Alice Fox, the witness, and the first wife of Albert Brady, *did not live with Albert Brady before the petitioner, Lucinda Watashe, was born in 1896, because he was married to Mary Brady, afterwards Davis, who was the mother of Dora Brady, in 1898.* The fact is the said census card showed Alice and Lucinda were enrolled June 20, 1899, and that Alice Fox, the mother of petitioner, Lucinda Watashe, was born in 1879, and that petitioner, Lucinda Watashe, was born in 1896, and that Alice Fox was the mother and Albert Brady the father of said Lucinda Watashe, and there was no occasion for said confusion. Thereupon the trial judge continued the examination.)

The Court: **She (Mary Davis) testified that she married him in the Sac and Fox County in 1894. Ain't that what the record shows?**

Mr. Cate (of counsel for respondents): **1898 I think** (p. 4998-4999, same).

Mr. McPherren: **This is (Alice Fox) the first woman he (Albert Brady) lived with.**

The Court: **No, sir, in the face of this statement.**

Mr. McPherren: **We will excuse the witness and except to the ruling of the court.**

The Court: **All right. Here is the reason the court holds this: Go back and read the statement of this woman.**

Mr. McPherren: **Albert Brady was sent to the penitentiary before the birth of Lucinda and he never came back to her. (Alice Fox.)**

The Court: **That may be your case, but I am talking about what this woman says. She testified before she had any agreement with Brady to live with him that she was twenty-five years old. Ain't that right. Now here you have introduced this card to prove when she was born. Now this shows she was twenty-five years old on March 13, 1902, and if she was twenty-five years old that would be 1907 when that occurred and after this white woman was married to Brady and the presumption is that marriage continued. She couldn't have an agreement to live with him and be his common law wife when he was already married. If you want it to go in it is all right with me."**

(All of the above statements were erroneous, and it was evident that the mind of the trial judge was sealed against evidence favorable to petitioners.)

"Mr. McPherren: I except to the ruling of the court and withdraw the witness.

The Court: **Hold on. Don't be so fast * * ***

The Court: **Yes, according to that I don't see how the same lawyer could represent both of them.**

(This was the trial judge's third attack on the right of counsel to represent petitioners.)

(For some reason, not apparent from the record other than the facts stated in said petition and affidavit to disqualify said trial judge, the trial judge persisted in assailing the good faith and integrity of counsel for the

petitioners, and asserting that said representation was improper, and as will hereinafter appear, endeavored to force the withdrawal of the said counsel as such attorney from this proceeding.)

Mr. McPherren: * * * They (the two petitioners) admit that they are sisters.

The Court: Who?

Mr. McPherren: Dora and Lucinda, these two admit that they are half-sisters.

The Court: This woman (the witness Alice Fox) would be an heir.

Mr. McPherren: She was divorced and married again.

(Evidently the trial judge had given no attention to the evidence as to the relationship and status of these petitioners and was shooting in the dark. Counsel for the groups, respondents herein, no doubt appreciated the fact that the proceedings had entirely passed from the sphere of a judicial proceeding and sought to restore the proceeding to a semblance of a judicial trial through the medium of the following statements for the information and guidance of the trial judge.)

Mr. Richardson: * * * They (the half-sisters) join together in their application each contending that they are (granddaughters) daughters.

The Court: If this is inheritance, descent—all right. You are trying your own law suit. Introduce it. (Who was trying the law suit? What was the issue other than inheritance—descent? Introduce what?)

Mr. McPherren: Your Honor said you wouldn't pay any attention. What is the use of proceeding further?

The Court: No, I didn't say I wouldn't pay attention.

Mr. McPherren: Will the court permit me to examine?

Mr. Gibson: (representing respondents): **We have no objection.**

(Note: Mr. Gibson and his associates now undertake to come to the aid of counsel so as to permit the examination to continue.)

Mr. Richardson: **Mr. Cate (representing respondents) says this date in the lower right-hand corner is the date of the application of all three of the parties on this card, and that this date, March 13, 1902, is the date of the approval of the roll by the Secretary of the Interior.**

The Court: **Then you say this other marriage was 1898. (It was in June of 1898.) That would go back to 1879 and she was twenty-five years old. That would put it around 1904. If you all want it in it is all right with me. (If who wanted it in?)**

(Note: Counsel for the coalition having agreed to the examination of this witness on the part of these petitioners, the court acquiesces with the statement "It is all right with me.")

Mr. Phillips: **Whether this Brady was any relation to Jackson Barnett is the real issue. We don't care whether they had 100 daughters or just one. (P. 5000.)**

Mr. Richardson: *** * * If Albert Brady was the son of the Jackson Barnett here in controversy and Dora Brady was his heir of course we wouldn't succeed. * * ***

(Counsel for the respondents were endeavoring to make the situation clear to the trial judge that they did not object to counsel appearing for the two half-sisters, but the trial judge refused to be mollified.)

The Court: **No.**

Mr. Richardson: **And if Dora is going to succeed it is immaterial with us if she shares it with her alleged half-sister.**

Mr. McPherren: **But we do not ask any concessions from them. We are not in this court by their leave, we hope, and we don't like our right to interrogate our witnesses to depend upon whether or not they agree to it.**

The Court: **If there is no objection made I permit you to examine.**

(Why was the right of counsel for petitioners to examine this witness on behalf of petitioners conditioned on consent of respondents?)

Q. Before you began to live with Albert Brady did you and Albert have any conversation or talk with any one? (No answer permitted.)

The Court: Let me get this straight. I am entitled to have all the information I want in a case. Now it developed for the first time Albert Brady went to the penitentiary. When did he go? (P. 5001, V. II, Rep. Tr.)

The Court: * * * She won't know the exact date.

Mr. Gibson: We object to the question because he assumes that they were married.

(What question assumed a marriage?)

Mr. McPherren: July 9, 1896. (Answering the trial judge.)

The Court: How long was he in the penitentiary?

Mr. McPherren: Released December 30, 1897.

Mr. Gibson: We object to the question as assuming they had a conversation.

The Court: No. She will have to state.

Mr. McPherren: That is what I asked.

Q. What was said by anyone if anything, before you and Albert Brady began living together?

Mr. Gibson: There is no proof they did.

Q. State whether or not you lived together.

Mr. McPherren: She said he was her husband.

The Court: The way I understood he lived with her and her mother both. (This statement of the trial judge convinced counsel for petitioners that any attempt to proceed further was worse than useless.)

Mr. McPherren: I decline to examine further. I am not permitted to do so.

The Court: Very well, if you want to withdraw, I will let you. (No one had asked to withdraw. Why did the trial judge so suggest?)

Mr. McPherren: I am not withdrawing. I am just turning her over to them.

The Court: If you want to abandon the case I will let you do so. (No one had expressed an intention to abandon the case.)

Mr. McPherren: No, sir.

The Court: And I will make the record. (What record?)

Mr. McPherren: I will surrender the witness to them. (P. 5002, same.)

Mr. Phillips: No questions.

The Court: Very well, you decline (addressing Mr. McPherren)?

Mr. McPherren: I have interrogated her as far as I am able to.

The Court: Very well, if you withdraw.

Mr. McPherren: I don't withdraw.

The Court: It is just up to you. I am going to make the record."

(What record? No further record of this occurence was made and petitioners undertook to present no further evidence as it was obvious that the mind of the trial judge was firmly closed to evidence on behalf of these claimants.)

It is sincerely believed that no unbiased mind, whether it be that of a lawyer or layman, can read the above record of the attempted examination of the witnesses on behalf of these petitioners and fail to be convinced that the trial judge had, as the result of personal bias and prejudice against these petitioners, lost all sense and conception of the principles of a judicial trial and actively participated in converting the proceedings into one which "failed to reflect that calm and deliberate consideration of the evidence, and that judicial impartiality which are consonant with the principles of justice and due process of law," and in which no consideration was given the evidence presented by these petitioners.

That in preparing the joint opinion of the Circuit Court of Appeals filed in the five separate appeals from the said judgment, the author thereof overlooked and on that account had no conception or appreciation of the broad scope and scathing nature of the unwarranted and unprovoked, hostile and threatening conduct, statements, innuendoes and charges on the part of the trial judge, during the attempted presentation of said evidence, against petitioners, petitioners' counsel and witnesses, and had in mind only the proceedings in the Bennie Barnett Scott, Lucy Kurns *et al.*, and Bertha Barnett *et al.* appeals, clearly appears therefrom as follows:

"One remaining argument merits attention. It is urged with emphasis that the trial, including the making of findings of fact, failed to reflect that calm and deliberate consideration of the evidence and that judicial impartiality which are consonant with the principles of justice and of due process of law. * * * The only phase of the matter worthy of discussion is the conduct of the court. *The record indicates that the attitude of certain attorneys was provocative at times, and the court was justified in the belief that some of the testimony was fabricated.* Still, we are not to be understood as approving all of the statements, comments and criticisms coming from the court, or the excess of interference with the attorneys in their examination of the witnesses. *But there is no showing whatever that the complaining parties failed to introduce all of the evidence which was available to them.* And we think the court reached the right conclusion in the end. *Another long and expensive trial, without the incidents of which complaint is made, would in all probability conclude with like findings of fact and judgment.* * * *" (122 Fed. (2d) 789, bottom second col.)

Since the record discloses no instance of provocative attitude or action on the part of counsel for the petitioners, and since the evidence on the part of petitioners was not challenged, as being fabricated or contradicted in any part, except in the hostile and unsupported verbal attacks of the trial judge, the above statements in said opinion could have no reference to petitioners or their counsel. Further, the said statement in the opinion that "* * * there is no showing whatever that the complaining parties failed to introduce all of the evidence which was available to them," if intended to apply to petitioners, is in the face of the record

of the proceedings. (Pp. 100-102, *supra*, and pp. 4898-5000, V. 10 and pp. 5001-5009, V. 11, Rep. Tr.)

As the record of the proceedings in the trial court shows (pp. 4714-5000, V. 10, and pp. 5001 to 5009, V. II, Rep. Tr.) when the turn of petitioners came to present their case, the same was presented to the extent the trial judge would permit during a part of two sessions, the entire hearing on the part of all parties consuming approximately twenty-four days, **separated by adjournments had on the initiative of the trial judge ranging in length from ten days to several months. The evidence, oral and documentary, in the record is voluminous; however same shows that a large part thereof consists of depositions which were presented in evidence as the record shows, without being read, and documentary evidence presented in like manner, and the excuse that the hearing was a heavy burden and overtaxed the strength of the trial judge** urged in the brief of counsel for respondents in the Circuit Court of Appeals is without foundation; however said situation, if true, should not weigh or militate against the granting of a fair trial before an unbiased and unprejudiced judge.

The occurrence and nature of the above attacks, and others of like character, on the part of the trial judge and counsel for respondents, upon petitioners, petitioners' counsel and witnesses, during the said proceeding, were not and could not be questioned since same, as is hereinbefore demonstrated, are conclusively evidenced by the record; however, counsel for the respondents undertook to explain and excuse same in appellees' brief as follows:

(a) By stating that, referring to Dora Brady *et al*: "This group complains of alleged mistreatment of some of their witnesses, and one of their counsel. The matters of which they complain arose primarily because of the manifest *absurdity of their claim.*" (Italics theirs.) (P. 213, Appellees' Brf., V. II, Appendix hereto.) Is it not pertinent to inquire why the presentation of the evidence of numerous uncontradicted and unimpeached witnesses and documentary evidence on behalf of petitioners conclusively supporting their claim that said Jackson Barnett was the father of Albert Brady and grandfather of petitioners should be considered by the trial judge a "manifest absurdity"? Although the evidence of more than a score of disinterested, unimpeached and uncontradicted witnesses establish the fact that the Jackson Barnett, who was a member of the Tuckabatchee Creek Town, and whose heirs are being herein determined, was the father of Albert Brady and the grandfather of petitioners, assume that the truth of said evidence, both oral and documentary, was questioned, on what theory could said attacks on the part of the trial judge be excused other than personal bias and prejudice?

Further the record shows that the trial judge devoted several combined orders, findings, statements and briefs, ranging from 10 to 264 typewritten pages in length, in adversely disposing of the claim of petitioners herein, and that one of the said documents covers 285 pages of Vol. II of the Clerk's transcript herein. Surely if the said claim was "manifestly absurd" such numerous and long argumentative orders could hardly have been required on the part of

the trial judge. We submit, without more, that this excuse is itself open to the charge of being a "manifest absurdity."

(b) By erroneously stating: "They (counsel for petitioners) tried improperly and unsuccessfully to impeach the tribal and final rolls of the Creek Nation." (Appellees' Brf. as above.) The fact is petitioners relied upon the final rolls of the Creek Nation, Brady's "Exhibit 5" herein, being the enrollment record of Albert and Dora Brady, the petitioner, which states that Jackson Barnett and Sinda Colbert were the parents of Albert Brady and grandparents of Dora Brady, the petitioner, and only questioned an immaterial recital that said Jackson Barnett, a member of the Hickory Ground Creek Town died prior to 1900, and presented documentary evidence, being all the rolls of the Hickory Ground Creek Town and the Town King, conclusively showing that no such Jackson, or Jackson Barnett, at any time was ever a member of said Hickory Ground Creek Town, and the oral evidence of numerous uncontradicted and unimpeached witnesses that said Jackson Barnett was a member of the Tuckabatchee Creek Town, but lived in the area of Hickory Ground Town.

The record herein shows that such erroneous statements of incidental matters occur so frequently that two such instances are presented in the evidence; one erroneous statement being as to the Creek Town to which the father of Ellen Barnett, an intervener herein, belonged, and as to the date of his death, and the other being the identically same erroneous statement as to the Creek Town and the date of the death of said Jackson Barnett, the father of said Albert

Brady and the grandfather of these petitioners. As to the first erroneous statement, the trial judge permitted proof of the fact and found same to be erroneous. (P. 1137(B5), Vol. II, Clk's Tr.; Sunny Exhibits 1, 2, pp. 33-37, Answer and Reply Brief, Vol. I, Appendix hereto, where facts are fully stated.)

As to the identical, immaterial, erroneous statement as to the Creek Town and the date of the death of said Jackson Barnett, the trial judge ruled to the contrary.

Aside from the above facts, conclusively to the contrary, assuming that petitioners were trying to impeach the tribal and final rolls of the Creek Nation—what justification would that furnish the trial judge for said attacks?

(c) *By stating that "Judge Williams was justly irritated and highly indignant because from time to time he was charged directly or by insinuation with judicial unfairness,"* and that said judges' *"just soul revolted at the misconduct of counsel and witnesses, and at the plain wickedness displayed at the trial."* (P. 200, Appellees' Brf., V. II, Appendix hereto.) (Pp. 42-43, Appellants' Answer and Reply Brfs., Vol. I, Appendix hereto.) Counsel for respondents have not and cannot point to any instance of wickedness or discourtesy on the part of counsel for petitioners toward the trial judge or counsel. The effort, during a part of two days, to present petitioners' evidence to the trial court was solely on the part of the writer of this brief, Chas. E. McPherren, who has actively engaged in the practice of law in what is now the State of Oklahoma for more than 45 years, practic-

ing in all the courts of the Territory and State, including tribal and federal courts, and has heretofore at no time committed or been charged with a contemptuous or improper act or statement. It is true that on June 16, 1938, after the said attacks, *and immediately upon the learning of pertinent facts which accounted for said acts, counsel prepared the petition and affidavit to disqualify the said trial judge on the ground of personal bias and prejudice against these petitioners and same was filed within two days after the participation of the trial judge in the execution and approval of said agreement and family setlement became known, and wherein the record facts and acts and doings of the said trial judge and counsel for respondents were fully stated.* Based thereon counsel for petitioners, as was their duty, have continuously presented and urged the disqualification and inability of said trial judge to fairly hear, consider or determine any issue in this cause. Obviously, the said acts and doings prior to the filing of the said petition and affidavit were not motivated thereby, and no reasonable excuse therefor other than the personal bias and prejudice of said trial judge appears.

(d) Likewise, the statement that "lawyers practicing in the case were provokingly uninformed with respect to the history of the matters under consideration and with respect to the laws governing the Creek Tribe of Indians to which Jackson Barnett belonged." (P. 199, Appellees' Brf., same.) This rather uncomplimentary, if not presumptuous charge, is not supported by the record, and counsel did not cite any

instances or evidence of such ignorance; however, ignorance could hardly be urged as a justification for such attacks.

(e) Counsel for respondents lastly complain "that there were frequent, unfounded and bitter attacks upon high placed and honorable representatives of the United States. * * *" (P. 199, Brf. of Appellees' V. II, Appendix hereto.) *In its application to petitioners and their counsel this statement refers to the fact that on June 16, 1938, when counsel for petitioners first learned through documents, just recently filed in this action that, beyond doubt, the said Assistant United States Attorney, representing the United States as interpleader herein on behalf of petitioners and other restricted Indian parties, and the trial judge, officers and representatives of the Departments of the Interior and Justice had, before the trial of this action began, collaborated with the attorneys for respondents in negotiating, executing, approving and carrying out said agreement between respondents, which had the objective of making certain the rendition of a judgment that respondents are the heirs of the estate of the said Jackson Barnett, as against these petitioners and all other parties to this action, and thereupon counsel advised petitioners of said above facts, and that immediately petitioners and said counsel, having in mind the prior repeated, unprovoked, hostile, and oppressive acts, statements, threats, and charges against petitioners, petitioners' counsel and witnesses on the part of the said trial judge and said counsel for respondents, during the attempt of counsel to present evidence on behalf of petitioners, were convinced and believe, as was and is natural and reasonable in said*

situation, that the door of the court had been closed against petitioners prior to the beginning of the purported trial of this action, and that the trial judge was a partisan of the respondents and so personally biased and prejudiced against petitioners and in favor of said respondents as to preclude the possibility of a fair and impartial trial of the issues between petitioners and respondents. So believing the petition and affidavit to disqualify said trial judge on the ground of said improper conduct and personal bias and prejudice was prepared and filed within two days after the first receipt of said information as to the said acts and doings of said officers, the trial judge, and the attorneys of the respondents, and therein all of the said above matters were fully set forth as facts, together with the record and correspondence relating thereto, and not as conclusions of fact. **This course cannot be fairly characterized as "* * * frequent, unfounded and bitter attacks upon high placed and honorable representatives of the United States * * * " The fact is, no lawyer worthy to practice at the bar, and no self-respecting litigant could do less in said situation.**

The above actions on the part of high officers of the United States is not the first similar attempt to aid in an attempt to seize, control and distribute the assets of this large estate of Jackson Barnett as is evidenced by the opinions of national courts including this Court as follows:

Barnett v. *Equitable Trust Co.*, 21 Fed. (2d) 325.
United States v. *Mott*, 37 Fed. (2d) 860.
Mott v. *United States*, 283 U. S. 747, 51 S. Ct. 642, 75 L. ed. 1385.
McGugin v. *United States*, 109 Fed. (2d) (10th Cir.) 94.

POINT FIVE

That it clearly appearing from the record that said trial judge required the respondents to put in issue the truth of the record facts, so set forth in said petition and affidavit to disqualify said trial judge, and that upon the hearing of the said petition and affidavit on its merits, the trial court admitted and considered voluminous evidence, both documentary and oral, in determining as to the truth of said allegations, and as to the existence of said alleged personal bias and prejudice in the mind of the trial judge. (R. 1070-1071, V. I and 1185-1189, V. II, Clk's Tr.; 109-115, Appellants' Brf., V. I, Appendix hereto, and 21-22 and par. 6, pp. 37-38, supra. It follows that the said trial court, in so proceeding, committed error, and that the trial court exceeded its jurisdiction on the hearing in finding and concluding that the matters and things alleged and set forth in said petition and affidavit were without foundation in truth and in fact, and that the said petition and affidavit were not filed in good faith, and on that account overruled same. In such situation the Circuit Court of Appeals erred in according the proceedings, findings, conclusions and judgment of said trial judge the force and effect of those of a qualified judge. (Pp. 119-122, *infra.*)

> "25. U. S. C. A., Sec. 21, Judicial Code. Affidavit of Personal Bias or Prejudice of Judge. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of

this title, or chosen in the manner prescribed in section 27 of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, *or good cause shall be shown for the failure to file it within such time.* No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith."

While the language of the statute is, "such judge shall proceed no further therein," the courts construe the language of the statute to mean *that the sole jurisdiction and duty of the trial judge involved is to pass upon the legal sufficiency of the application and affidavit, and that in doing so said judge must accept as true the statements of the application and affidavit and may not inquire into the good faith of the affiant.*

The leading case in point is *Morris et al.* v. *United States,* 26 Fed. (2d) (8th Cir.) 444, which went up to the Circuit Court of Appeals from the Northern District of Oklahoma. It appeared that the defendant, Morris, and others, immediately before the case was called for trial, filed application and affidavits to disqualify the trial judge upon the ground of personal prejudice against the respective defendants and in favor of the United States. The affidavits, in substance, recited that the trial judge was biased and prejudiced against them and in favor of the Government on account of the fact that the trial judge had made addresses before civic clubs and churches in support

of law enforcement, and had stated that he intended to bear down with heavy hands on offenders against the criminal law, stating that the higher the law violator's collar and the whiter his shirt, the longer his sentence; expressed willingness to coöperate in the enforcement of the prohibition laws; that one of the defendants had theretofore been tried on a similar charge; that rigid cross-examination had been conducted and the trial judge had stated at the time, in open court, that in his opinion the witnesses had been tampered with in said case; and said judge had ordered witnesses held for perjury; that relatives of the affiants had been tried on similar charges before the said judge, and that the said judge had stated that the Morris tribe seemed to believe that they had a right to sell whiskey.

As the reason for not filing the affidavit to disqualify the trial judge sooner, the defendant, in substance, stated that on the 20th day of July, 1927, he received information, which he believed, that the trial judge had interested himself in obtaining evidence against the defendant, and that said information, together with the other facts stated, convinced the defendant that the trial judge was disqualified, and that on the following day the said defendant filed said affidavit to disqualify the trial judge in which said fact and the facts theretofore known to the defendant were set forth. It will be observed that this Morris case is on all fours with the case at bar.

The trial judge held that "*the matters set out in the application have been within the knowledge of the defendants and their counsel for many weeks prior to this date, the*

date these cases come on for trial; that the applications are not made in good faith, but for the purpose of causing delay in the trial of these cases, and for that reason they will be denied."

On appeal to the Circuit Court of Appeals, the two controlling questions discussed and decided, were the following:

1. As to whether or not the trial judge had the right and jurisdiction to pass upon the good faith of the affiants in filing said applications and affidavits to disqualify said trial judge.

2. As to whether or not said applications and affidavit which were filed on the date and at the time the case was called for trial, were timely under the facts presented.

The Circuit Court of Appeals in the opinion answered the *first question in the negative, and the second in the affirmative.* In answering the first question and in holding that the trial judge had no authority and jurisdiction under the provisions of the said above-quoted statute to inquire into and determine the good faith of the affiants in filing said applications and affidavits to disqualify said trial judge, the Circuit Court of Appeals held and cited supporting authority as follows:

> "Upon examination of this section of the statute and of the decisions construing the same, we are constrained to the opinion that it was not within the province of the trial judge to pass upon the good faith of the defendant, the affidavit being sufficient in form and accompanied by the required certificate of counsel as to good faith. *Berger* v. *United States,* 255 U. S. 22, 41 S. Ct. 230, 65 L. ed. 481; *Henry* v. *Speer* (C. C. A.), 201 Fed. 869;

Saunders v. *Piggly-Wiggly Corp.* (D. C.), 1 Fed. (2d) 582; *Chafin* v. *United States* (C. C. A.), 5 Fed. (2d) 592: certiorari denied 269 U. S. 552, 46 S. Ct. 18, 70 L. ed. 407; *Lewis* v. *United States*, 14 Fed. (2d) 369 (C. C. A., Okla., 1926); *Nations* v. *United States* (C. C. A.), 14 Fed. (2d) 507, certiorari denied 273 U. S. 735, 47 S. Ct. 243, 71 L. ed. 866; *Benedict* v. *Seiberling* (D. C.), 17 Fed. (2d) 831; *Bishop* v. *United States* (C. C. A.), 16 Fed. (2d) 410; *Craven* v. *United States* (C. C. A.), 22 Fed. (2d) 605."

In answering in the affirmative the second question as to whether the affidavit to disqualify was filed in time where same was filed on the second day after the receipt of the said information as to the said action of the trial judge, the Circuit Court of Appeals reasoned and cited supporting authority as follows:

"Aside from the question of good faith, was the application and affidavit timely? From the affidavit it appears that much of the matter and many of the facts recited were within the knowledge of the defendant, A. B. Morris, for a considerable time before the day of trial. The affidavit recites that on several occasions defendant requested his attorneys to prepare and file application to disqualify the trial judge, but that his attorneys disagreed with him (and it is inferable that defendant yielded to his counsel) until the 20th day of July, 1927, when affiant received new information which was imparted to his attorneys. The affidavit further recites that on the 20th day of July, 1927, affiant obtained an affidavit of one Joe Irvin, which supports the statements made by affiant upon information and belief, as to the fact that His Honor, F. E. Kennamer, had interested himself in obtaining evidence against the affiant, and that on the 20th day of July,

1927, affiant was informed, and verily believes it to be true, that while Department of Justice agents were making investigations in Tulsa, Oklahoma, the said F. E. Kennamer reported to such agents that one of the deputies United States marshall had used Snake Morris, one of the worst bootleggers in the country, as a guard while transferring prisoners. The affidavit further recites that said information could not have been obtained at an earlier date, as it was not known to any of the parties defendant that the same existed until this affiant was so informed as above stated.

"Assuming that until the 20th day of July, 1927, defendant in the face of the persuasion of his counsel, was hesitant or in doubt, we think we can not say as a matter of law that the additional alleged information was not calculated to confirm a doubtful belief upon the subject and if it was sufficient and did have that effect, defendant could not well have acted more promptly in preparing his application and affidavit and filing the same than the following morning. In these circumstances we are of opinion that the application should not have been held untimely. In the light of the authorities cited, we think the trial court erred in assuming to pass upon the good faith of defendant, and in the circumstances the application was timely.

* * * * * * * * *

"Where the party entitled to object is not informed of the disqualifying facts until after the expiration of the time in which objection should be made, his objection, made on discovery of the facts will be regarded as seasonably made."

The above is the text of a part of Section 180, 33 C. J., page 1014, and is supported by the citation of a number of cases, and we have found none holding to the contrary.

In the case at bar it appears that during the two last days of the hearing before the recess was taken a number of the matters and things charged as grounds for the disqualification of the trial judge occurred; it further appears from the specific statements in said affidavit for disqualification that the existence of said contract and the documents and letters referred to, quoted and attached to the petition of Lucy Kurns *et al.*, to disqualify the said trial judge herein, which are referred to and made a part of the said disqualifying affidavit of affiant herein, and which contract, documents and letters revealed the doings, negotiations and acts of the representatives of the respondents, and the knowledge and participation of the trial judge therein did not become known to counsel for the affiant, Dora Brady, intervener in the said cause, until June 16, 1938, two days before said disqualifying petition and affidavit were filed herein on June 18, 1938, and did not become known to the said affiant, Dora Brady, until the actual day of the filing of the same. That it was the fact of the said doings, negotiations and acts and the knowledge and participation therein of the trial judge, together with the stated prior acts and doings of the said trial judge, that thoroughly convinced the affiants, and counsel for the affiants, that the said trial judge was personally biased in favor of the members of the said Siah Barnett, Conner, Stepney-Gough respondents, and against the claims of the petitioners, Dora Brady and Lucinda Watashe.

Since it appears that the said application and affidavit for disqualification of the trial judge was filed within two

days after the said information first became known to counsel for petitioners, and on the very day that it became known to the petitioners, it certainly should be held that the said application and affidavit were filed in due time, and that the trial judge was not warranted in overruling or striking same on that ground.

> "Under Judicial Code, Sec. 21 (Comp. St., Sec. 988), where proper affidavit of trial judge's disqualification because of prejudice was filed, truth of allegations thereof could not be disputed, and it was judge's duty to proceed no further."

The above is the holding in *Lewis* v. *United States*, 14 Fed. (2d) (8th Cir.) 369, being a case arising in the Eastern District of Oklahoma and in which Judge Kennamer refused to disqualify. In discussing and citing authority in support of the holding, the Court used the following language:

> "Did the trial judge err in failing to disqualify himself, upon the filing of the affidavit of prejudice?
>
> "The affidavit for disqualification was carefully drawn, and is similar to that in *Berger* v. *United States*, 255 U. S. 22, 35, 41 S. Ct. 230, 65 L. ed. 481. It was there held, quoting from the headnotes:
>
> " '1. Upon the filing of an affidavit of a party to a case in the district court, in conformity with Judicial Code, Sec. 21 (Comp. Stat., Sec. 988), averring the affiant's belief that the judge before whom the case is to be tried has a personal bias or prejudice against him, and stating facts and reasons, substantial in character, and which, if true, fairly establish a mental attitude of the judge against the affiant which may prevent impartiality of judgment, it becomes the duty of the judge to retire from the case.

" '2. The judge may pass upon the sufficiency of the affidavit, but not upon the truth or falsity of the facts alleged.'

"To the same effect is *Nation* v. *United States,* 14 Fed. (2d) (8th Cir.) 507, decided by the court on July 17, 1926.* * *"

In the Nation case it is held:

"The statute itself is plain in its terms and imperative in its requirements. There is little room for construction. The Supreme Court said in the Berger case:

" 'There is no ambiguity in the declaration and seemingly nothing upon which construction can be exerted—nothing to qualify or temper its words or effect. It is clear in its permission and direction. It permits an affidavit of personal bias or prejudice to be filed and upon its filing, if it be accompanied by certificate of counsel, directs an immediate cessation of action by the judge whose bias or prejudice is averred, and in his stead, the designation of another judge. And there is purpose in the conjunction; its elements are complements of each other. The exclusion of one judge is emphasized by the requirement of the designation of another.' "

The Circuit Court of Appeals overlooked and failed to discuss or decide this controlling point.

The opinion of this Court in *Berger* v. *United States,* cited *supra,* is the leading and most-often cited authority. Therein it is held, in substance, *that no disqualified judge should conduct the proceedings of a national court, and that as to whether or not a judge was disqualified was one of greatest importance.* In so holding this Court stated:

"Our interpretation of section 21 has therefore no deterring consequences, and we cannot relieve from its

imperative conditions upon a dread or prophecy that they may be abusively used. * * * *We must conclude Congress was aware of them and considered that there were countervailing benefits. At any rate we can only deal with the act as it is expressed and enforce it according to its expressions. Nor is it our function to approve or disapprove it; but we may say that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged.*

"* * * **To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and if prejudice exist it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.**

"After overruling the motion of plaintiffs for his displacement Judge Landis permitted to be filed a stenographic report of the incident and language upon which the motion was based. We, however, have not discussed it because under our interpretation of section 21 it is excluded from consideration."

It is evident from the above federal authority that the trial judge and the Circuit Court of Appeals overlooked and failed to follow the recognized rule *that a trial judge upon the timely filing of a sufficient petition and affidavit*

to disqualify said trial judge because of personal bias and prejudice has no jurisdiction to thereupon order or to permit the truth of such facts to be put in issue and to then hear evidence and try and determine whether said alleged facts are true, and as to whether said petition and affidavit were filed in good faith, and to find and conclude that said alleged facts were not true, and that the affidavit and petition were not filed in good faith, and that the proceedings and judgment of said court presided over by said disqualified judge were in excess of its jurisdiction, and that same should have been set aside, and that the Circuit Court of Appeals erred in according said proceedings and judgment the weight and presumption due those of a court conducted by a qualified judge.

POINT SIX

That it is clear from the face of the said petition and affidavit to disqualify said trial judge, as well as the unquestioned record of the proceedings, both of which are digested above, that the Circuit Court of Appeals in finding and concluding and holding in the opinion herein that said petition and affidavit to disqualify, "fell far short of stating facts showing bias and prejudice of the court and therefore failed to comply with the requirements of the statute," and that same stated conclusions and not facts, and that the same was not filed until approximately sixty days "after the bias and prejudice of the trial court became apparent," overlooked all of the above stated unchallenged facts. (Pp.

512-547, V. I, and 1332-1342, V. II, Clk's Tr.; pp. 82-97, Appellants' Brf., V. I, Appendix hereto; and pp. 19-23, *supra*.

In that said petition, affidavit and record speak for themselves, it is unnecessary to discuss same further.

POINT SEVEN

Since it appears from Creek Census Card No. 1701, Field No. 1705 (Brady Ex. 5 and Fishers' Ex. Nos. 19, 23), being the enrollment record of said Albert Brady, prepared by the Commission in enrolling Albert Brady, the father of petitioners, Dora Brady and Lucinda Watashe, that Jackson Barnett was the father of the said Albert Brady, it follows that, under the well-recognized rule, announced in controlling federal decisions, that such recital as to the parentage of the enrollee, which appears on the census card (enrollment record) of said enrollee, prepared by the Commission to the Five Civilized Tribes, is descriptive of said enrollee and *prima facie* proof of such stated parentage, and said recital cannot be overthrown, except by clear, cogent and convincing proof to the contrary, and there being no such proof in the case at bar, the said District Court and Circuit Court of Appeals herein erred in failing to follow and apply herein the said rule, although same was applied as to the enrollment record of Jackson Barnett, showing Siah Barnett to be his father. (P. 782 (3-5) Second Col., 122 Fed. (2d).

POINT EIGHT

The Circuit Court of Appeals further overlooked the fact that in determining the right of Albert Brady to enrollment as a member of the Creek Tribe of Indians, and determining his identity information as to whether or not Jackson Barnett, the father of Albert Brady was living or dead at the time of the listing of Albert Brady, or that the said father was a member of any particular Creek Town, were such as is not required as descriptive matter under the provisions of Section 21, of the Act of Congress, June 28, 1898, and on that account such statements were immaterial, and the further reason that the Creek Town to which Albert Brady belonged was controlled by that of his mother, Sinda, and such incidental statements in the absence of special legislation, are without effect, and are not admissible in evidence.

POINT NINE

Where the census card or enrollment record of Albert Brady (Brady Ex. 5), the father of these petitioners, Dora Brady and Lucinda Watashe, which is in evidence herein, states that Jackson Barnett and Sinda (Cinda, Lucinda) were the father and mother of said Albert Brady, and the census card, or enrollment record of Lucinda Watashe, formerly Brady (Brady Ex. 10, p. 4997, V. 9, Rep. Tr.), finds that the parents of Lucinda Watashe were said Albert Brady and Alice Fox, it follows, under controlling decisions, and the presumption is that the said parents of both

said Albert Brady and Lucinda Watashe were married, and that the said Albert Brady and Lucinda Watashe were legitimate, and that the findings and conclusions of the trial judge herein, in substance, that there was no evidence that said stated parents were married, and that Albert Brady and Lucinda Watashe were illegitimate, are erroneous, and the Circuit Court of Appeals erred in approving said findings and conclusions.

The last above three Points are supported by the following authorities:

Page v. *Atkins*, 86 Okla. 290, 209 Pac. 807.

Carter Oil Co. v. *Scott*, 12 Fed. (2d) 780.

Yaholar v. *Autry*, 156 Okla. 257, 10 Pac. (2d) 676.

Mowdy v. *Leeper*, 122 Okla. 16, 250 Pac. 432.

Malone v. *Alderdice*, 212 Fed. 668.

Palmer v. *Replogle*, 152 Okla. 140, 4 Pac. (2d) 30.

United States v. *Wildcat*, 244 U. S. 111, 61 L. ed. 1024, 37 S. Ct. 561.

Haskell v. *Beartail*, 107 Okla. 103, 227 Pac. 392.

Hegler v. *Faulkner*, 153 U. S. 109, 14 S. Ct. 779, 38 L. ed. 463.

Locust v. *Carruthers*, 23 Okla. 373, 100 Pac. 520.

McFarland v. *Harned*, 115 Okla. 291, 243 Pac. 14.

Cox v. *Colbert*, 135 Okla. 218, 275 Pac. 317.

(Pp. 156-174, Appellants' Brief; pp. 59-61, Petition for Rehearing, V. I, Appendix hereto, wherein the above propositions are fully presented.)

POINT TEN

While it seems clear from the above that the issuance of a Writ of Certiorari to review the said opinion and judgment of the Circuit Court of Appeals is within the legal discretion of this Court under Section 240 of the Judicial Code (Sec. 347, U. S. C. A., tit. 28), the Court also has jurisdiction to issue said writ herein to review the said opinion and judgment under Sec. 262, Jud. Code, 28 U. S. C. A., Sec. 377, because the said trial judge exercised excessive jurisdiction in said proceedings and in rendering said judgment, and the Circuit Court of Appeals erred in not vacating and setting the said judgment aside on that ground.

In *Ex parte Chetwood,* 165 U. S. 443, 17 Sup. Ct. 385, as is stated in paragraph 6 of the headnote, the Court held:

> "While, under the authority given to the federal courts to issue 'all writs which may be agreeable to the usages and principles of law' (Rev. St. 716), certiorari has ordinarily been used merely as an auxiliary process, yet, when the circumstances imperatively demand it, *the writ may be allowed by the Supreme Court, as at common law, to correct excesses of jurisdiction, and in furtherance of justice.*"

In *Shields* v. *United States,* 273 U. S. 583, 47 Sup. Ct. 478, wherein the point was as to the action of the trial judge in communicating with the jury other than in open court, and this Court granted a writ of certiorari on that account to review the judgment of the Circuit Court of Appeals which affirmed the judgment of the District Court, and on consideration of same, reversed said judgment.

In *Quercia* v. *United States,* 289 U. S. 466, 53 Sup. Ct. 698, brought to this Court for review on writ of certiorari, the judgment of the Circuit Court of Appeals affirming the judgment of the trial court, was reversed on the ground that the trial in the district court was not fairly conducted because of the fact that the judge of the said court stated to the jury that, in his opinion, a part of the evidence of the defendant was false. It is true that said statement of the trial judge was made to the jury trying the case; however, where, as in the case at bar, the judge is the trier of the facts, the expression of the opinion during the course of the trial that witnesses were committing perjury, counsel committing subornation of perjury and similar charges, based, not upon evidence produced in the trial, but on matters *aliunde* the trial, are much more objectionable and clearly deprive the proceeding of due process of law, and a judgment rendered in such proceeding should be the subject of review by this Court in the exercise of its sound discretion.

In *In re Church Street Building Corporation,* 299 U. S. 24, 57 Sup. Ct. 88, the Court, speaking through Mr. Chief Justice HUGHES, after referring to Section 262, Judicial Code, 28 U. S. C. A., Section 377, held:

> "* * * That provision contemplates the employment of this writ in instances not covered by section 240 of the Judicial Code (28 U. S. C. A. 347), and affords ample authority for using the writ as an auxiliary process and as a means 'of giving full force and effect to existing appellate authority and of furthering justice in other kindred ways.' * * *"

In *Turner* v. *United States*, 14 Fed. (2d) (8th Cir.) 360, speaking through LEWIS, Circuit Judge, it is held that under the provisions of said Section 262 of the Judicial Code that certiorari either protects jurisdiction already acquired or aids in acquiring jurisdiction which might be defeated without the writ and cites *United States* v. *Beatty*, 232 U. S. 463, 467, 34 Sup. Ct. 392, 58 L. ed. 686. To the same effect is the statement of this Court in *Berger* v. *United States*, 255 U. S. 22, 41 Sup. Ct. 230, that the "* * * solicitude is that the tribunals of the county **shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial justice. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged.** * * *"

In Section 6283, V. 8, page 533 of Hughes Federal Practice, in discussing the nature and value of the "sound judicial discretion," that is indulged by this Court in passing upon petitioners for Writs of Certiorari to review the decisions of other courts, among other things stated:

> "The value of the discretion thus constituted is indicated further by the manner of its composition. It is composed with 'careful thought in the light of supporting and opposing briefs, and resolved in accordance with recognized principles.' *The necessary element of judicial discretion thus recognized is that each case 'has its day in court.'* The 'resolution of the matters according to recognized legal principles' is the important qualification of discretion produced by the words 'sound judicial.' Content of discretion is not involved—only the

manner of its formation. In addition to that of giving the petitioner his 'day in court,' some of the legal principles which may be involved in the formation of discretion are: Furtherance of statutory purposes, rules of construction, effect of language and opinions, common law principles, relation between courts, and constitutional rights. Such legal principles inhere in each exercise of discretion, and are in the nature of legal action * * *"

Where, as in the case at bar, it appears that the trial judge was personally biased and prejudiced against petitioners and in favor of respondents, as the result of occurrences prior to and *aliunde* the trial of the cause, and that such personal bias and prejudice was so broad, deep and strong as to impel said judge, during the subsequent purported trial of the cause, to repeatedly impune the acts and motives of petitioners and their counsel, and to continuously charge said counsel with fixing witness, subornation of perjury, and other misconduct, and petitioners' witnesses with perjury, and one of the petitioners with immorality, all without cause, provocation or supporting evidence, said trial judge on that account was disqualified to hear and determine the issues between petitioners and respondents, and to make findings of fact and render judgment in said cause, and on review of said proceedings in the Circuit Court of Appeals the said judgment and proceedings should have been set aside and vacated. Further, where in said action the petitioners against whom the said trial judge was so personally biased and prejudiced, promptly, upon learning of said prior occurrences, duly and timely filed a sufficient petition and affidavit for the disqualification of the said judge

on said ground, the said trial judge had no jurisdiction to proceed further with the purported trial, and where the said trial judge directed or permitted the truth of said acts so alleged in said petition and affidavit to disqualify to be put in issue, and evidence on said issue to be presented by the respondents on the hearing thereof, and the said judge thereupon found and concluded that said alleged acts were not true, and that the petition and affidavit were not filed in good faith, and overruled said petition and affidavit and proceeded to hear the cause, make findings of fact, conclusions of law and rendered a judgment therein against said petitioners, such proceedings and judgment were in excess of the jurisdiction of the court presided over by the said prejudiced judge, and the opinion and judgment of the Circuit Court of Appeals on appeal therefrom, wherein same were accorded the consideration, weight and presumptions of a judgment of a duly qualified judge and affirmed, same will be reviewed on certiorari from this Court.

POINT ELEVEN

That the trial judge either overlooked, ignored or disregarded all the evidence on the part of all the parties, the admissions, and stipulation on the part of respondents, as to the material and controlling facts, in refusing to approve and make findings of fact based thereon, which were duly and timely requested on behalf of the petitioners, and found other purported controlling facts in the face of all the evidence on behalf of all the parties, and the Circuit Court of Appeals overlooked and did not refer to, discuss, or decide the Point.

As appears on page 8, *supra*, the appellees', respondents' Answer Brief, filed in the Circuit Court of Appeals, V. II, p. 156, Appendix hereto, *admits that the controlling question in this case, as between the petitioners and respondents, was and is as to whether the Jackson Barnett, who was the father of Albert Brady, and the grandfather of petitioners, was the Jackson Barnett whose heirs are being herein determined.* In recognition of this fact that the decisive question was one of identity of the Jackson Barnett, who was the father of Albert Brady, as the Jackson Barnett whose heirs are being herein determined, the petitioners presented evidence, both oral and documentary as appears above, covering chronologically the birth, whereabouts, doings and family relations of Jackson Barnett, a Tuckabatchee Creek Indian, and father of Albert Brady, from the time of his birth until his death *which evidence is unchallenged, and conclusively establishes the fact that the Jackson Barnett whose heirs are being herein determined was the Jackson Barnett, who was the father of Albert Brady. Further, the evidence on the part of respondents and other parties relating to the said period of the life of Jackson Barnett, prior to his attaining the age of approximately 39 years, together with the stipulation and statements of counsel for respondents, establish said facts as to identity as appears from the following:*

1. Rebecca J. Baker and Nancy Posey, leading witnesses for respondents, testified and there was no evidence to the contrary, that said Jackson Barnett, the son of Thlesothle, and a Tuckabatchee Creek Town Indian, shortly

after the Civil War, and some time after the death of his mother, was left at the home of William McCombs, by his Aunt Jennie (Connor) Jeffrey and her husband, Uncle Jeffrey, and that they saw him there when a boy big enough to run errands (pp. 3887-3888, V. 8; 5337-5351, V. 11; 13268-13269, V. 18, Rep. Tr.). It was stipulated that said Jennie (Connor) Jeffrey was the aunt of said Jackson Barnett. (V. II, pp. 1464-1465, Clk's Tr. and pp. 39-40-50, Appellees' Brief, V. II, Appendix hereto.)

2. Not only did counsel for respondents admit during the purported trial, and in their said brief (p. 109, V. II, Appendix hereto) that the Jackson Barnett, who lived at Leecher's, was the Jackson Barnett whose heirs are being determined herein, the trial judge stated during the hearing that he believed such to be the fact (p. 8323, V. 17, Rep. Tr.).

3. The Jackson Barnett, whose heirs are being herein determined, himself, in 1912, before he became wealthy, and while the oil and gas lease, which was the source of his wealth, was being considered and approved in the County Court of Okmulgee County, Oklahoma, was brought into said court by ALBERT, no doubt, his son, ALBERT (BARNETT) BRADY; said ALBERT did not testify and his identity is not of record. At said hearing before said County Court in May, 1912, said Jackson Barnett, as was the custom with the band of "Snake Indians," to which the evidence shows he belonged, refused to answer questions as to his personal relations and affairs, and answered that he did not know, but stated that ALBERT had brought him in when

the lease was filed, and further testified that he had worked on the ferry run by an Indian about thirty or forty years prior to that time. (Pp. 60-65 of Seborn Fisher's Exhibit No. 11, p. 7, Appellants' Answer and Reply Brief, V. I, Appendix hereto.) This evidence was presented by the respondents, and in connection with the evidence of R. C. Mason, p. 8680, V. 18, Rep. Tr. shows that this ALBERT was Albert (Barnett) Brady, the son of Jackson Barnett, and that the Jackson Barnett, whose heirs are being herein determined stated he had a son named Albert who at that time, 1913, lived on his farm near Bristow, Creek Nation, Oklahoma.

Counsel for petitioners duly and timely requested in writing the trial judge to find said so-established, admitted, and stipulated facts as to the said birth, whereabouts, family relations and identity of said Jackson Barnett, during said period prior to his attainment of the approximate age of 39 years, and the trial judge refused and denied said request (pp. 604-609, V. I, Clk's Tr.; 131-135 Appellants' Brief and 2-5 Appellants' Answer and Reply Brief, V. I, Appendix hereto.)

On the other hand, what was the course of counsel for respondents and the trial judge with regard to this controlling question of identity? The most significant fact in this proceeding, other than said attacks of the trial judge and counsel for respondents upon petitioners, petitioners' counsel and witnesses, *is that counsel for respondents did not request, and the trial court did not find, and refused to find, any fact as to the acts, doings, whereabouts, family relations and identity of said Jackson Barnett occurring or*

existing prior to approximately 1891 when Jackson Barnett was about 39 years of age! It was for this most material period in the life of said Jackson Barnett concerning which no findings were requested by counsel for respondents, and the trial judge refused all findings requested on the part of petitioners relating thereto, that said Jackson Barnett, as all the evidence shows, lived first, at McCombs', then at Colbert's, where said Albert Brady, his son, was born, and then lived at Leecher's Ferry beore he lived about in the Senora, later Bryant, or Siah Barnett neighborhood. **It was only for the period in the life of Jackson Barnett, after he was about 39 years old that respondents requested, and the trial judge made findings, except that he lived in the Creek Nation, Indian Territory, which findings were correctly made and made so as to exclude the Tennessee and Kentucky claimants, who claimed that Jackson Barnett lived in Tennessee and Kentucky during said period.**

Is it not obvious that such findings of fact so requested by counsel for petitioners, which covered the birth, doings, whereabouts and family relations of said Jackson Barnett for the period prior to the time he appeared at the Senora, later Bryant, or Siah Barnett neighborhood, were based on the evidence, admissions and stipulations of all the parties, except the Tennessee and Kentucky claimants, who asserted that he lived during said period in Tennessee and Kentucky, and that any finding as to the whereabouts and family relations of Jackson Barnett during that period of his life, based upon any evidence whatsoever, would serve to show that said Jackson Barnett was the father of Albert

Brady, and the grandfather of petitioners? A sufficient reason for such failure of counsel for respondents to request findings of fact relating to said period is that same would result in a finding herein against the respondents, and in the nature of things counsel for respondents opposed and were successful in preventing any findings with relation to said period in the life of Jackson Barnett by the trial judge. A natural inquiry in determining as to whether said Jackson was the father of Albert Brady, would be as to who were the associates of said Jackson Barnett, and where did he live and what were his family relations prior to the time he attained the age of 39 years, and appeared in said Senora, later Bryant or Siah Barnett neighborhood? The findings of the trial judge are only to the effect that he lived somewhere in the Creek Nation. What reason can be suggested for the failure of counsel for respondents to request, and for the trial judge to refuse to make, any findings whatsoever relating to the whereabouts, identity, and family relations of the Jackson Barnett, whose heirs are being herein determined, prior to his attaining an age of 39 years other than the avoidance of his identification prior to that period?

Regardless of the motive for such failure and refusal on the part of counsel for respondents and the trial judge, the direct effect thereof was the arbitrary exclusion of petitioners from the case, since, as counsel for respondents state, and which clearly appears, the said identity of said Jackson Barnett during said period prior to his attainment of the age of 39 years was controlling in petitioners' case.

The fact is petitioners were not concerned with the occurrences in the life of Jackson Barnett subsequent to said period.

Supplementing the above, petitioners earnestly ask the Court to hold in mind the significant and controlling situation that all the evidence on the part of all the parties that relates to the birth, whereabouts, and family relations of the Jackson Barnett, whose heirs are being determined in this action, the greater part of which is digested above, without conflict, establishes beyond question, that said Jackson Barnett was born near Buzzard Hill, Creek Nation, in about 1852, and lived with his mother, Thlesothle, in that locality until about the beginning of the Civil War (1861); that his mother died during or about the close of said war (1865); that his Aunt Jennie and Uncle Jeffrey, when he was big enough to run errands, left him at the home of Billy McCombs; that when about grown (1872-1875), he lived at the home of Judge Joe Colbert, the uncle of Sinda Colbert; that he and Sinda lived together during that period, and had a son, Albert, in approximately 1874 or 1875; that when said Albert was about one year old, Jackson Barnett and Sinda separated; that Jackson went to Leecher's Ferry to live (1875), and Sinda took Albert and went to live with her brother; that Jackson lived at Leecher's until about 1891, when he was about 39 years of age, when he began living about in the Senora, later Bryant, or Siah Barnett neighborhood; and that later he was kidnapped and lived in different places in Oklahoma, Kansas, and California until he died in Los Angeles, California, in 1934.

The above conclusively establishes a state of facts which requires the determination of the admittedly controlling fact as to whether the said Jackson Barnett, whose heirs are being herein determined, was the father of Albert Brady, and the grandfather of petitioners, Dora Brady and Lucinda Watashe, in the affirmative, and the trial court erred in refusing to so find.

All the witnesses on the part of all the parties, including respondents except the Tennessee and Kentucky claimants, who testified as to the facts relating to the birth, parentage, whereabouts, associates and family relations of Jackson Barnett, who was the son of Thlesothle, stated that he was born and lived with his mother in the vicinity of Buzzards Hill, then at McCombs', then at Colbert's, where his son Albert was born, and then at Leecher's (Leecher's Ferry) until he was approximately 39 years of age. Also, testified that said Jackson Barnett was a Tuckabatchee Creek Town Indian and the only Indian of that name who lived in said locality, and there was no evidence to the contrary. Among said witnesses so testifying were the following:

John Catt, Rep. Tr. V. 3, pp. 1329-1330.

Ben Marshall, Rep. Tr. V. 3, pp. 1477-1478.

Ernest Gouge, Rep. Tr. V. 3, pp. 1532-1539.

Charley Barnett, Rep. Tr. V. 6, pp. 2725-2726.

Mary Fields, Rep. Tr. V. 6, pp. 2844-2845.

Taylor Bear, Rep. Tr. V. 8, pp. 3827-3828, 3831-3832, 3839-3851.

Louis Scott, Rep. Tr. V. 8, p. 3768.

Anna Beams, Rep. Tr. V. 8, pp. 3693-3709.

Rebecca J. Baker, Rep. Tr. V. 8, pp. 3887-3889, and V. 21, pp. 10044-10045.

Robert Deer, Rep. Tr. V. 8, pp. 3755, 3762.

Thompson Colbert, Rep. Tr. V. 10, pp. 4728, 4737.

Wade Kilcrease, Rep. Tr. V. 10, pp. 4757, 4760.

Robert Kelley, Rep. Tr. V. 10, pp. 4770-4771.

Louis Pittman, Rep. Tr. V. 10, pp. 4955-4958.

Jim Hutton, Rep. Tr. V. 11, pp. 5078-5097.

Sarty Cowee, Rep. Tr. V. 11, p. 5050 and V. 19, pp. 9227, 9236.

Tom Moore, Rep. Tr. V. 11, pp. 5014-5015.

Winnie Hendrex, Rep. Tr. V. 16, p. 7816.

George Scott, Rep. Tr. V. 17, pp. 8200-8203, 8206.

Jim Alexander, Rep. Tr. V. 19, pp. 9313-9316.

Ellen Smith, Rep. Tr. V. 19, p. 9259-N.

Nancy Posey, Rep. Tr. V. 25, p. 13268, and V. 11, p. 5337, same.

John A. Jacobs, Rep. Tr. V. 25, pp. 13263, 13276 and V. 6, pp. 2670-2673.

Nathan Williams, Rep. Tr. V. 25, pp. 13206-13218.

Lucy Scott, Rep. Tr. V. 25, p. 13247.

Three witnesses, who personally knew who were the parents of Albert (Barnett) Brady, testified in this proceeding, that said parents to their own knowledge were Jackson Barnett, a Tuckabatchee Creek Town Indian, and

Sinda Colbert, a Hickory Ground Creek Town Indian, as follows:

Thompson Colbert, Rep. Tr. V. 10, pp. 4728-4737.

Mary Davis, same, pp. 4794-4795.

Robert Kelley, same, pp. 4766-4767.

Wade Kilcrease, same, pp. 4749-4760.

That said Jackson Barnett, the father of Albert (Barnett) Brady and grandfather of petitioners, Dora Brady and Lucinda Watashe, was living long subsequent to 1900 when counsel for respondents contend he was dead, was the substance of the evidence of the following uncontradicted and unimpeached witnesses:

Dora Brady, p. 4982, V. 10, Rep. Tr. and V. 18, p. 8651.

Jacob Canfield, pp. 4916-4921, V. 10, Rep. Tr.

Mary Davis, pp. 4791-4795, V. 10, Rep. Tr.

Lon Hall, pp. 4857-4859, V. 10, Rep. Tr.

Hugh Hale, pp. 4898-4900, V. 10, Rep. Tr.

Robert Kelly, pp. 4773-4775, Rep. Tr. V. 10.

Susie Lawson, pp. 4839-4848, V. 10, Rep. Tr.

Della Hale, pp. 4904-4909, V. 10, Rep. Tr.

Lucille Hiatt, pp. 4814-4819, V. 10, Rep. Tr.

Nora Pearson, p. 4879, V. 10, Rep. Tr.

Mrs. Lee Phillips, pp. 4827-4835, V. 10, Rep Tr.

R. C. (Colbert) Mason, pp. 8675-8696, V. 18, Rep. Tr.

C. M. Allen, pp. 8715-8726, V. 18, Rep. Tr.

The references to the volume and page of the evidence

of witnesses, contained in the Petition and Brief herein, are not furnished with the expectation that the Court will refer to same in the record, as the substance thereof is digested herein, and counsel for respondents, through the use of said references, may conveniently point out any misstatements herein as to the substance of said evidence.

It is true that the rule is that this Court will accept the findings of the trial court and the Circuit Court of Appeals based on conflicting evidence, unless it clearly appears that said courts erred as to the effect of the evidence; however this rule does not apply in the case at bar as is demonstrated in the Petition for this Writ, in this Supporting Brief, in the briefs of these petitioners, as appellants, and respondents, as appellees, filed herein in the Circuit Court of Appeals (Vols. I and II, Appendix hereto) for the following reasons:

1. That the trial judge was disqualified on account of evident personal bias and prejudice against petitioners and in favor of respondents to conduct said hearing and make said purported findings and conclusions and enter the judgment herein, and that the said qualification of the said judge so to do had been theretofore challenged by petitioners in timely filing and presenting a sufficient petition and affidavit to disqualify said trial judge on account of said personal bias and prejudice, and that the action of the said trial judge in thereafter proceeding with the said hearing and purporting to make said findings and conclusions and *to enter the judgment herein was in excess of jurisdiction of said trial court herein.*

2. That the findings in substance that petitioners were

not the granddaughters and heirs of the said Jackson Barnett, deceased, is contrary to the evidence and not supported by any evidence as is clearly evidenced in the record and briefs above digested and cited.

3. That the Circuit Court of Appeals in affirming the said findings and the judgment herein on the ground that same are "supported by substantial evidence implemented by the stipulation referred to, and are not clearly erroneous, due regard being given to the opportunity of the trial court to judge of the credibility of the witnesses and the weight to be given to their testimony," overlooked the fact that the said trial judge was disqualified on account of said personal bias and prejudice to hear, consider, and determine the issues presented, and that on that account said findings and conclusions of the said trial judge were not entitled to the consideration accorded same in the Circuit Court of Appeals, and that *the implementing stipulation referred to was between counsel representing collateral claimants and did not relate to the case of petitioners, who are lineal descendants of Jackson Barnett and without interest in the subject-matter of said stipulation, and that the "many sharp inconsistencies and irreconcilable conflicts in the evidence" related only to the collateral claimants and not to the case of these petitioners.* The fact is, as is herein demonstrated, the opinion of the Circuit Court of Appeals herein relates almost exclusively to issues and questions presented only in the appeals of collateral claimants, and only incidentally to the appeal of these petitioners, who are the direct descendants of said Jackson Barnett, deceased.

POINT TWELVE

The finding and conclusion of the trial court that Jackson Barnett "from his youth up had been and was an incompetent; that he was weakminded, and generally known as 'Crazy Jack,' and that he had never at any time had sufficient mental capacity to enter into a valid marriage contract" (pp. 728, 737, V. II, Clk's Tr.) is contrary to all the evidence on the part of all the witnesses presented by all the parties, referred to and digested above, and *which is in substance that Jackson Barnett was an average Indian boy and man until after he left Leecher's Ferry in 1891, when about 39 years of age, and thereafter became a roving, shiftless "Snake Indian" and lived about from place to place.* Pp. 13-14, *supra,* and volumes of record therein cited; and pp. 9-41, Appellants' Brief, V. I, Appendix hereto.

POINT THIRTEEN

That the said findings and conclusion of the trial judge that there was no evidence that the parents of Albert (Barnett) Brady, Jackson Barnett and Cinda Colbert, were married, and the inference therefrom that "the said Lucinda Watashe and Dora Brady, the children of said Albert Brady, are not the next of kin and heirs of said Jackson Barnett, Creek Roll No. 4524, whose heirs are being determined herein," and that he was "weakminded and generally known as 'Crazy Jack,' and that he never at any time had sufficient mental capacity to enter into a valid marriage contract" (p. 31, *supra*), aside from the fact that same is con-

trary to all the evidence, as is demonstrated above, are erroneous for two additional reasons: First, as is presented on pages 124-125, above, since the enrollment record of Albert Brady shows that Jackson Barnett and Cinda Colbert were the parents of said Jackson Barnett, the presumption is they were married, and that he was legitimate, and, second, admitting for argument, although not the fact, that at the time said Jackson and Cinda lived together and Albert was born, said Jackson Barnett was incompetent, still after the death of Jackson Barnett and Cinda Colbert, their marriage cannot be successfully attacked in an effort to show the illegitimacy of the offspring of same. *Hunt* v. *Hunt et al.*, 23 Okla. 490, 100 Pac. 54; *Hughes* v. *Kano*, 60 Okla. 202, 173 Pac. 447; Sec. 677, O. S. 1931; *Ross* v. *Ross*, 175 Okla. 633, 54 Pac. (2d) 611; pp. 174-177, Appellants' Brief, V. I, Appendix hereto.

The Circuit Court of Appeals overlooked and did not discuss or decide this controlling point.

POINT FOURTEEN

That the said finding by the trial judge "that neither Albert Brady, Mary Fisk, his wife, nor Dora Brady, ever made any effort to cause him * * * (Jackson Barnett) * * * to have any relief, although now it is attempted to be made to appear that they had an interest * * * it was known by them that Jackson Barnett was in distress as disclosed by Exhibit 'I' in evidence * * *" p. 714, V. II, Clk's Tr.; pp. 21-22, *supra*, is fairly indicative of the feeling and state of

mind of the trial judge toward petitioners. The uncontradicted evidence of all the witnesses of all the parties who testified in relation to this matter, and which evidence is digested above, is contrary to the said finding, and shows that Albert and Dora Brady had the said exhibit in their possession in 1917 and discussed their said father and grandfather with their neighbors, and there is no fact or circumstance supporting said finding. Said Brady Exhibit "I" is a lengthy newspaper account, published September 2, 1917, of the alleged treatment of Jackson Barnett by the officers and representatives of the Interior Department relative to the handling of his great estate, and a facsimile of same is presented in full on pages 122-123 of appellants' brief, V. I, appendix hereto, and the Court is respectfully requested to examine same and consider same in connection with the above finding. It is believed that the conclusion must be that the mind of the trial judge was necessarily biased and prejudiced against the petitioners.

While this Court soundly stated in the opinion in *Berger* v. *United States, supra,* that "* * * To commit to the judge a decision upon the truth of the fact (as to the truth of the facts alleged) gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision that a disposition of a mind in which there is a personal ingredient * * * " *it must follow that where "the evil against which the*

section is directed" has in fact occurred, and a judgment is erroneously entered by the disqualified judge, and the said proceedings and judgment of the disqualified judge on appeal therefrom are "fortified by presumptions" on said appeal by being accorded the weight and consideration due those of a disqualified judge, that this Court will in the exercise of its sound discretion, and the performance of one of its elementary functions review said proceedings and judgment through the issuance of a writ of certiorari.

Respectfully submitted,

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